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Supreme Court of the United States

THE CALIFORNIA SPEEDWAY CORPORATION,

Petitioner,

v.

ROBERT MILLER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a court afford deference to a government agency's interpretation of ambiguous regulatory language, where the proffered interpretation covers a subject matter that the agency had previously intentionally excluded from the scope of its notice and comment rulemaking?

PARTIES AND RULE 29.6 STATEMENT

The parties include the petitioner, The California Speedway Corporation, and the respondent, Mr. Robert Miller.

International Speedway Corporation is the parent corporation and owns 10% or more of the stock of The California Speedway Corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 536 F.3d 1020. (Pet. App. 1.) The opinion of the district court is set forth at 453 F. Supp. 2d 1193. (Pet. App. 27.) The order denying rehearing en banc is available on Pacer. (Pet. App. 53.)

JURISDICTION

The Ninth Circuit entered its judgment on April 11, 2008, and it denied the petition for rehearing en banc on September 16, 2008. (Pet. App. 52.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of Title III of Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12189, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 553(b) and 551, ADA Accessibility Guidelines ("ADAAG"), 28 C.F.R. Part 26 Appendix A, § 4.33.3, and the 1994 Supplement to the Department of Justice Technical Assistance Manual ("TAM"), § III – 7.5180 are reproduced in the Appendix. (Pet. App. 54-82.)

STATEMENT OF THE CASE

Plaintiff and appellant, Robert Miller, a disabled wheelchair user, has been attending NASCAR races at the California Speedway racetrack since 1997. (Pet. App. 30.) Mr. Miller's complaint against California Speedway is that his line of sight becomes obstructed when the spectators in front of him stand up at times during races.

Mr. Miller filed this action alleging that California Speedway is in violation of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181, et seq. (Pet. App. 3.) The district court granted California Speedway's motion for summary judgment. Thereafter, the court entered judgment and Mr. Miller filed an appeal.

The Ninth Circuit reversed the judgment, acknowledging the split in authority between circuits, and concluding that the Department of Justice standard for section 4.33.3 requires facilities covered by Title III of the ADA to provide lines of sight viewing over standing spectators. (Pet. App. 3.)

The decision below, in conflict with a Third Circuit decision, impermissibly extends liability based on the Department of Justice's retroactive change of a legislative rule through "interpretation" when the original rule intentionally omitted the specific issue in question, and the change was made without notice or opportunity for comment. The issue impacts a broad spectrum of individuals, businesses, and agencies with concerns that the Administrative

Procedure Act requirements of notice and opportunity for comment be followed. The Ninth Circuit's expansion of ADA liability also raises issues of national importance to disabled individuals and owners of sporting arenas and stadiums, theaters, concert halls, and racetracks. The decision substantially affects a rule of national application in which there is an overriding need for national uniformity. Presently, confusion reigns supreme. The Third Circuit has ruled one way; the Ninth and the D.C. Circuit's have ruled the opposite way. Litigants and lower courts desperately need guidance. This Court should take the opportunity to settle the issue once and for all.

A. Statutory Background.

Congress enacted Title III of the ADA to prohibit discrimination against disabled individuals, including the failure to design and construct readily accessible and usable facilities. 42 U.S.C. § 12183(a)(1). (Pet. App. 60.) The ADA directs the Attorney General to "issue regulations . . . that include standards applicable to facilities" covered by Title III, and to provide "appropriate technical assistance manuals to individuals or entities with rights or duties under Title III." 42 U.S.C. §§ 12186(b), 12206(c)(3). (Pet. App. 60-61.) However, the Attorney General's regulations must be consistent with the "minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board," a federal agency with representatives from different agencies

such as the Department of Justice (the "Access Board"). 42 U.S.C. § 12186(c). (Pet. App. 61.)

In January 1991, six months after enactment of the ADA, the Access Board published its first proposed ADA Accessibility Guidelines, known as "ADAAG." 536 F.3d at 1025. (Pet. App. 5.)

In February 1991, the Department of Justice ("DOJ") issued a notice of proposed rulemaking stating that the standards published as Appendix A, would include the ADAAG proposed by the Access Board "together 'with amendments made by the [Access Board] during its rulemaking process.'" 536 F.3d at 1025, citing 56 Fed. Reg. 7478, 7492 (1991). (Pet. App. 7.) The DOJ notice expressly stated, "the Department proposes to adopt these guidelines as the accessibility standard applicable under this rule." 56 Fed. Reg. 7478-79 (1991). (Pet. App. 7.) It further requested that any comments be sent to the Access Board.

The Access Board published its final ADAAG in July 1991. Section 4.33.3, the applicable section for purposes of this case, stated in pertinent part:

> "Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and <u>lines of sight comparable to those for members of the general public</u>."

56 Fed. Reg. 35,514 (1991) (italics omitted, underlining added for emphasis). (Pet. App. 66.)

With regard to the specific problem of lines of sight over standing spectators, the Access Board commented that "the issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities." 56 Fed. Reg. 35,440 (1991). (Pet. App. 65.) Thus, the Access Board did not propose a rule to deal with this line of sight issue, but left it for a future guideline.[1]

On the same date that the Board issued its final ADAAG, the DOJ issued its final Title III regulations, adopting and incorporating the ADAAG, including section 4.33.3, verbatim. *See* 28 C.F.R. § 36.406 & App. A. (Pet. App. 63-64.) The DOJ did not address the issue of lines of sight over standing spectators, but it did state that "all comments on the Department's proposed rule . . . have been addressed adequately in the final [guidelines]." 56 Fed. Reg. 35,586 (1991). (Pet. App. 66.)

In 1992, the Access Board repeated its intent to address the issue in future guidelines for recreational facilities. 57 Fed. Reg. 60,612, 60,618 (1992). (Pet. App. 67-70.) In 1999, the Access Board proposed

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[1] An Access Board "guideline" is different from a DOJ "guideline," since guidelines developed by the Access Board are its substantive rules. Thus, when it made reference to a future guideline, the Board was not referring to a future interpretation of section 4.33.3, but rather to a separate substantive rule it would promulgate. By contrast, a DOJ guideline is an interpretation of a substantive rule, not the substantive rule itself. *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 734 n. 5 (3d Cir. 1999).

amendments to its guidelines addressing the standing spectator issue. 64 Fed. Reg. 62,248, 62,501-02 (1999). (Pet. App. 71-72.)

Guideline 802.2.2.1 adopted in 2004, states "Where standing spectators are provided lines of sight over the heads of spectators standing in the first row in front of their seats, spectators seated in wheelchair spaces shall be afforded lines of sight over the heads of standing spectators in the first row in front of wheelchair spaces." 69 Fed. Reg. 44,392-93 (2004). (Pet. App. 76-79.) The DOJ published proposed regulations adopting this guideline, but the regulations have not yet been adopted. 73 Fed. Reg. 34,508 (2008). (Pet. App. 80-81.)

B. The Decision of the District Court.

In its decision granting California Speedway's motion for summary judgment, the district court found the following facts were uncontroverted: 1) California Speedway Corporation operates a public racetrack where events such as NASCAR racing are held; 2) Robert Miller, a disabled wheelchair user, has attended NASCAR races at the track; 3) when Mr. Miller occupies wheelchair spaces, he cannot see over spectators standing in the rows in front of him, and accordingly, he cannot view the more exciting parts of the race. 453 F. Supp. 2d at 1196. (Pet. App. 30-31.)

The district court stated the DOJ's current position on ADAAG section 4.33.3 – that wheelchair-bound individuals be provided lines of sight over

standing spectators – is reasonable. 453 F. Supp. 2d at 1198. However, according to the court, the key analysis is not reasonableness. It is whether the Department of Justice's interpretation constitutes "a fundamental modification of its previous interpretation. [Citation.]" 453 F. Supp. 2d at 1198. The court acknowledged the even split among four courts on the issue of whether the Access Board's comments regarding addressing the issue in the future must be imputed to the DOJ, and as such the DOJ could not subsequently change its original position of not addressing the issue when section 4.33.3 was promulgated without undergoing the notice and comment procedure required by the Administrative Procedure Act.

After analyzing all four cases, the district court concluded the Third Circuit's approach in *Caruso*[2] represents the most principled analysis, and adopted the reasoning and conclusions of *Caruso* as its own. 453 F. Supp. 2d at 1203. The district court concluded that the Access Board's position is imputed to the DOJ and the DOJ was not free to change its interpretation in 1994 without going through the notice and comment process. In so holding, the district court took into account the Department of Justice's broad

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[2] *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 737 (3d Cir. 1999) (Alito, J., joined by Nygaard and Rendell, JJ.).

approval of the Access Board's actions and the absence of public expression of contrary intent.

C. The Decision of the Ninth Circuit ("the Decision Below").

The Ninth Circuit disagreed with the district court, rejected the logic of *Caruso*, and sided with the D.C. Circuit's decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997) ("*Paralyzed Veterans*"). The court recognized that the federal courts that have previously considered this issue are split down the middle. 536 F.3d at 1024. (Pet. App. 3.)

The Ninth Circuit acknowledged the language of section 4.33.3 requiring "lines of sight comparable to those for members of the general public" is ambiguous. 536 F.3d at 1028. The court observed that the possible meanings of that phrase include: 1) wheelchair-bound individuals must have a view unobstructed by physical obstacles; 2) seats must be horizontally or vertically dispersed to provide different viewing angles; and/or 3) wheelchair-bound individuals must be able to see over standing spectators. 536 F.3d at 1029.

According to the Ninth Circuit, the Department of Justice adopted the text of the Access Board's guidelines, but not the Access Board's interpretation of the language. 536 F.3d at 1031-32. The court reasoned that the guidelines were merely a "launching point" for the Department of Justice. The DOJ

was not bound by the Access Board's interpretations, as long as the DOJ's regulations satisfied a "minimum level of equivalence." 536 F.3d at 1032. As such, the court concluded the Access Board's interpretation should not be imputed to the Department of Justice.

Finally, the Ninth Circuit concluded that, in any event, there was no need for notice and comment because the Access Board's original position and the Technical Assistance Manual constituted interpretive rules. 546 F.3d at 1033.

D. The Denial of Rehearing En Banc.

California Speedway filed a petition for rehearing en banc. The Ninth Circuit denied the petition. (Pet. App. 53.)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit exacerbated a split among circuits by siding with the D.C. Circuit and against the Third Circuit and concluding that the Department of Justice is not bound by the Access Board's interpretation of guidelines. The effect of this departure from the settled law of the Third Circuit is significant. Case law interpreting the ambiguous regulatory language remains more uncertain than ever to the detriment of litigants across the country. A uniform rule is warranted and urgently needed.

Disabled individuals and proprietors of sporting arenas deserve no less.

The Ninth Circuit also deepened an intra-circuit split on the issue of whether an agency may change a legislative rule retroactively through interpretation when the issue was intentionally omitted from the original rule. This issue impacts more than just disabled persons and owners of sporting arenas. By granting this petition, this Court will have the opportunity to curb the unsavory practice of promulgating vague proposed regulations and changing them retroactively under the guise of "interpretation" without going through the notice and comment procedure. The California Speedway submits that the requirements of the Administrative Procedure Act should be respected and adhered to, not undermined.

This Court should, therefore, grant this petition.

I. THE NINTH CIRCUIT'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE GIVEN THE INTER-CIRCUIT SPLIT OF AUTHORITY AND THE CONFLICT WITH THE DECISION OF THE THIRD CIRCUIT AUTHORED BY JUSTICE ALITO.

The precise issue presented in this appeal has been previously considered by the appellate courts of the Third Circuit and D.C. Circuit in *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 736-37 (3d Cir. 1999) and

Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 587 (D.C. Cir. 1997). Those courts reached opposite conclusions about the validity of the lines of sight over standing spectators requirement of the DOJ's supplemental TAM.[3] The Ninth Circuit in this case sided with the D.C. Circuit, and rejected the Third Circuit's analysis in *Caruso*. In *Caruso*, then Circuit Judge Alito concluded that the DOJ should have adopted the lines of sight over standing spectators requirement via notice and comment rulemaking, rather than trying to impose the new mandate via an interpretative rule. After recounting the regulatory history of section 4.33.3, the Court summarized the appellant's arguments as follows:

> Based on this regulatory history, the E-Centre contends that Standard 4.33.3 was intended to leave unresolved the issue of lines of sight over standing spectators, and, as a result, the DOJ was not entitled to "interpret" Standard 4.33.3 in 1994 in a fashion that did resolve the issue of sightlines over standing spectators. *Cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994) (courts need not defer to an agency's interpretation of its own regulation if an "alternative

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[3] These same issues have also been addressed in two published district court decisions, *Independent Living Resources v. Oregon Arena Corporation*, 982 F. Supp. 698, 742-43 (D. Or. 1997) and *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1269 (D. Minn. 1997), with the Oregon decision siding with *Caruso*, and the Minnesota decision siding with *Paralyzed Veterans*.

> reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation"). The E-Centre maintains that, if the DOJ wanted to impose a new requirement that wheelchair users be able to see over standing patrons, it had to engage in notice and comment, since such a requirement would constitute a new substantive rule. [Citations omitted.]

193 F.3d at 735-36. The Third Circuit then addressed the appellant's reliance upon the decision of the D.C. Circuit, *Paralyzed Veterans of America v. D.C. Arena L.P.*, 326 U.S. App. D.C. 25, 117 F.3d 579 (D.C. Cir. 1997).

> Appellants dispute the E-Centre's characterization of the 1994 DOJ statement as a "substantive" rule. They argue that, because the DOJ did not explicitly adopt the Access Board's commentary, the meaning of Standard 4.33.3 was not limited by that commentary when it was adopted, and thus the 1994 statement does not constitute a "change" in the requirements under 4.33.3. They also maintain that even if the Access Board's commentary can be attributed to the DOJ, the DOJ was entitled to change its interpretation of Standard 4.33.3 in 1994 without notice and comment.
>
> With regard to the threshold question of whether the Access Board's commentary can be attributed to the DOJ, the appellants rely on the District of Columbia Circuit's analysis in *Paralyzed Veterans of America v. D.C.*

Arena L.P., 326 U.S. App. D.C. 25, 117 F.3d 579 (D.C. Cir. 1997):

> If the Department, when it promulgated the regulation, had said what the Board said, or even clearly adopted what the Board said, it would be hard to conclude that the Department did not subsequently "amend" the regulation in violation of the APA. But Justice did not do so in its statement of basis and purpose. It never referred to the Board's concern, nor did it imply that its regulation did not address the problem of lines of sight over standing spectators. It may well be that it is a plausible inference that Justice, at the time, deliberately intended the regulation to mean the same thing as did the Board – but it is not a necessary inference. . . . We admit the issue is not easy; appellants almost but do not quite establish that the Department significantly changed its interpretation of the regulation when it issued the 1994 technical manual.

Caruso, 193 F.3d at 736, citing *Paralyzed Veterans*, 117 F.3d at 587.

Finally, the Third Circuit expressed its disagreement with the D.C. Circuit's conclusion and explained its reasoning as follows:

We agree that "the issue is not easy," 117 F.3d at 587, but we respectfully disagree with the District of Columbia Circuit's conclusion that the DOJ did not adopt what the Access Board had said. Instead, we conclude that the DOJ implicitly adopted the Access Board's analysis of 4.33.3. This conclusion is strongly supported by the following factors: 1) the DOJ referred all comments to the Board; 2) the DOJ relied on the Board to make adequate changes based on those comments; 3) the Board specifically changed the language of 4.33.3 in response to comments and explained that change in its commentary; 4) the DOJ was a "member of the Board" and "participated actively . . . in preparation of both the proposed and final versions of the [guidelines]," 28 CFR Part 36, App. B, at 632; and 5) the DOJ's commentary stated that the final guidelines promulgated by the Board adequately addressed all comments. *Accord Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 741 (D. Or. 1997).

We thus agree with the appellants that 4.33.3, when viewed in light of the regulatory history recounted above, does not reach the issue of sightlines over standing spectators. A court should not defer to an agency's interpretation of its own regulation if "an alternative reading is compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994).

> Thus, we do not accept the interpretation set out in the DOJ Technical Assistance manual. "An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning." 1 Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.10 at 283 (1994).

Caruso, 193 F.3d at 736-737.

A crucial difference between *Caruso* and the Ninth Circuit's decision involves the question of whether or not the DOJ had adopted the Access Board's commentary that the lines of sight over standing spectators issues would be left for future rulemaking, and was thereby bound by that interpretation. In *Caruso*, the Third Circuit concluded that the DOJ had in fact adopted the Board's analysis, and the Court identified five factors supporting that conclusion. *Caruso*, 193 F.3d at 736. *See also, Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. at 740-42 (holding that the DOJ implicitly adopted the Access Board's comments and was bound by them because the DOJ's commentary was itself insufficient to satisfy APA notice and comment requirements).

Although conceding that *Caruso's* analysis is "a fair one," the Ninth Circuit decision decided the question the opposite way, agreeing with the D.C. Circuit, and concluding that the DOJ adopted only the *text* of the guidelines themselves, not the Access Board's interpretation of that text, and therefore the

DOJ was free to adopt a stricter interpretation. 536 F.3d at 1031-32.[4]

However, the Ninth Circuit's decision does not address the important fact that the DOJ did not publish any commentary of its own, and without such commentary, the DOJ's regulations would be invalid. *See Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. at 740 (citing *Gamoa v. Rubin*, 80 F.3d 1338, 1346, *vacated on jurisdictional grounds*, 101 F.3d 90 (9th Cir. 1996)). The regulatory history shows that the DOJ left the notice and comment procedure for the Access Board:

> . . . DOJ did not respond to public comments regarding individual Standards, nor did DOJ explain the agency's reasoning in adopting a specific Standard or why it had rejected alternative language suggested by persons commenting on the proposed Standards. That task was left to the Access Board. *See, e.g.*, 56 Fed. Reg. at 35,587 (in DOJ's view, the substantive comments received regarding the proposed Standards "have been addressed adequately in the final ADAAG. Largely in response to comments, the [Access] Board made numerous changes from its proposal . . . ")

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[4] *See Paralyzed Veterans*, 117 F.3d at 587; *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1269 (D. Minn. 1997) (adopting the *Paralyzed Veterans'* opinion as persuasive and dispositive).

Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. at 740.

The D.C. Circuit did address this issue, albeit obliquely, and concluded, although it was a "plausible inference" that the DOJ intended its regulation to mean the same thing as did the Access Board, it was not a "necessary" inference, and therefore the DOJ was free to issue a stricter interpretation of section 4.33.3, "imposing a greater burden on those entities covered by its regulation." *Paralyzed Veterans*, 117 F.3d at 587.

Accordingly, granting certiorari is warranted based on the clear inter-circuit split regarding the interpretation of section 4.33.3 and the DOJ's supplemental TAM, the broad reach of these regulations, and the need for national uniformity in the interpretation of this exceptionally important issue.

II. GRANTING THE PETITION FOR CERTIORARI IS ALSO DESIRABLE AND WARRANTED IN ORDER TO HEAL THE INTRA-CIRCUIT SPLIT CREATED BY THE NINTH CIRCUIT'S DECISION IN THIS CASE.

The Ninth Circuit in this case found that deference should be afforded so long as the proffered interpretation is consistent with any reasonable interpretation of the regulation in question, unless an alternative reading is compelled by the agency's intent at the time the regulation was promulgated.

In *Hemp Industries v. Drug Enforcement Administration*, 333 F.3d 1082 (9th Cir. 2003), various producers of consumable products that contained sterilized hemp seeds or hemp oil, brought an action challenging a new "interpretive rule" by the DEA, that made their products illegal. The hemp products had previously not been included within the definitions of "marijuana" and "THC" as set forth in the applicable DEA regulations.

The Ninth Circuit in *Hemp Industries* held that an agency's putative interpretive rule is invalid where it addresses a subject matter which was consciously omitted from the scope of the current regulation. Significantly, in reaching this conclusion, the Court followed *Caruso*, 193 F.3d at 737, for the proposition that "an agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of a rule to mean something other than its original meaning." *Hemp Induss.*, 333 F.3d at 1091.

It is well settled that an agency may issue a "legislative" rule only after following the notice and comment procedures mandated by the APA. 5 U.S.C. § 553(b). The notice and comment procedure is also required for amending, or repealing a rule. 5 U.S.C. § 551(5). However, an agency is not required to follow the notice and comment procedure when it issues

"interpretive" rules. 5 U.S.C. § 553(b)(3)(A). The Court in *Hemp Industries* noted that the distinction between legislative and interpretive rules was key to the decision in that case: "If the DEA's rule is genuinely an interpretive rule, it is valid despite the absence of notice and comment procedures. If the DEA's rule has the effect of a legislative rule, it is invalid because of the agency's failure to comply with the APA procedures." *Hemp Induss.*, 333 F.3d at 1087.

Speaking generally, interpretive rules "merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule." *Hemp Induss.*, 333 F.3d at 1087. In contrast, legislative rules "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Id.* Relying on the D.C. Circuit's decision in *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106, 1109 (D.C. Cir. 1993), the Court in *Hemp Industries* noted three circumstances where a rule has the "force of law" and is therefore legislative in nature:

> (a) when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action;
>
> (b) when the agency has explicitly invoked its general legislative authority; or
>
> (c) when the rule effectively amends a prior legislative rule.

Hemp Induss., 333 F.3d at 1087.

Upon reviewing the DEA's effort to "interpret" its existing regulations regarding marijuana and THC to include the products sold by the plaintiffs, the Court in *Hemp Industries* concluded that the DEA's new rule effectively changed the existing regulations, because the regulations had originally "consciously omitted" those products from the regulations. The Court explained:

> An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning." *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 737 (3d Cir. 1999) (quoting 1 Kenneth Culp Davis and Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.10 at 283 (1994)). Yet here the DEA similarly attempts to evade the time-consuming procedures of the APA by interpreting an existing regulation to cover naturally-occurring THC, which was consciously omitted from the scope of the current regulation. Consequently, the DEA's putative interpretive rule is invalid. To properly bring organic THC under the listing of THC, the DEA must promulgate a legislative rule in accordance with the APA, a process it has already begun.

Hemp Induss., 333 F.3d at 1091.

A very similar situation is presented here. In January 1991, the Access Board published its first proposed ADAAG, and the Access Board published its

final ADAAG in July 1991. Section 4.33.3 stated in pertinent part:

> Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.

56 Fed. Reg. 35,514 (1991) (italics omitted, underlining added for emphasis).

The Access Board commented that "the issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities." 56 Fed. Reg. 35,440 (1991). Thus, the Access Board did not propose a rule addressing this issue, but instead left it to be dealt with in a future guideline.

The DOJ issued its final Title III regulations, adopting and incorporating the ADAAG, and quoting section 4.33.3, verbatim. *See* 28 C.F.R. § 36.406 & App. A. While the DOJ failed to address the issue of lines of sight over standing spectators, it did state that "all comments on the Department's proposed rule . . . have been addressed adequately in the final [guidelines]." 56 Fed. Reg. 35,586 (1991).

Despite the fact that the Access Board specifically left this question open for future rulemaking, and despite the fact that the DOJ adopted the Board's guidelines verbatim and did not respond to any comments on its own, in 1994 the DOJ published a supplemental Technical Assistance Manual ("TAM")

that mandated, with regard to the requirements of section 4.33.3, that "*in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand.*" *See* 536 F.3d at 1026 (citing to TAM § III-7.5180 (1994 Supp.)). There was no notice or opportunity for comment afforded before this TAM was published.

So the question presented by this petition is whether the DOJ may "interpret" one of its rules in order to impose a requirement that was intentionally omitted when the rules were initially promulgated. Previously, in *Hemp Industries*, the Ninth Circuit agreed with *Caruso* that it is not appropriate for an agency to change a legislative rule retroactively through interpretation, when the original rule consciously omitted the particular issue in question. In other words, it is impermissible for an agency to make an end run around the APA by omitting an issue and then later imposing a new rule on the public by interpretive fiat. *See also, Paralyzed Veterans*, 117 F.3d at 584 ("It is certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations'.").

The Ninth Circuit's decision in this case conflicts with its holding in *Hemp Industries*. The instant decision holds that so long as the newly adopted "interpretation" is consistent with the language of an existing ambiguous regulation, the Court must give substantial deference to the agency's interpretation,

even though the issue under consideration was specifically left open during notice and comment rulemaking. The Ninth Circuit further holds that the DOJ was not bound by the Access Board's comments because the DOJ did not adopt the comments, only the regulations, and therefore, the DOJ was free to impose its own more strict interpretation of the ambiguous language, even without following the notice and comment procedure. Lastly, even assuming the DOJ initially agreed with the Board that section 4.33.3 did not address the problem of standing spectators, the Ninth Circuit holds that it was permissible for the DOJ to "change its mind" and adopt a stricter interpretation.

Each of the Ninth Circuit's findings is in conflict with the holding of *Hemp Industries*. Therefore, this Court should grant certiorari and provide a uniform rule for all federal courts across the United States with regard to the appropriate standard of deference and review of an agency's rulemaking activity.

III. THE NINTH CIRCUIT'S EXPANSION OF ADA LIABILITY RAISES ISSUES OF NATIONAL IMPORTANCE REQUIRING GUIDANCE FROM THIS COURT.

Granting certiorari is necessary in this case because the "line of sight over standing spectators" issue is one of national application and national importance, affecting disabled individuals and

numerous theaters, concert halls, sports arenas and stadiums, racetracks and similar facilities.

A very recent decision of the Ninth Circuit, *United States of America v. AMC Entertainment, Inc.*, 2008 U.S. App. LEXIS 24645 (9th Cir. Dec. 5, 2008), illustrates the widespread confusion among various courts regarding the ambiguous language of section 4.33.3. The Ninth Circuit in that case stated:

> Because 'lines of sight comparable' lacked a concrete meaning, and the Access Board and the DOJ failed to provide clear direction as to the precise meaning of section 4.33.3, litigants turned to courts throughout the country to determine the regulation's breadth. Plagued by an opaque regulation and minimal legislative history, however, the various circuits did not reach a uniform understanding as to what exactly section 4.33.3 required of theater companies building stadium seating complexes.

Id. at *9.

As the Third Circuit observed in *Caruso*, 193 F.3d at 216, the district court in that case "expressed its frustration that the regulation, even when read in conjunction with secondary materials, 'suffers from a vagueness not cured by interpretative manuals or enforcement history which would put meat on the bones of the concept of enhanced sight lines.'"

The Ninth Circuit in *AMC* noted that while the Third Circuit and the D.C. Circuits "reached different

conclusions as to section 4.33.3's exact requirements, the D.C. Circuit and the Third Circuit did agree that the regulation was hardly a model of clarity." *Id.* at *13.

With respect to sight lines in theaters, the Ninth Circuit in *AMC* noted that the Third Circuit interpreted section 4.33.3 to not require an unobstructed view, the D.C. Circuit concluded it mandated that some seats had an unobstructed view, the Fifth Circuit interpreted the provision to require an unobstructed view but not comparable viewing angles and the First, Sixth and Ninth Circuits stated that the language mandated some sort of comparable viewing angle." The *AMC* court concluded that all of the above circuit courts, however, agreed on one thing – the regulatory language is vague or ambiguous. *United States of America v. AMC Entm't, Inc.,* 2008 U.S. App. LEXIS at *17.

California Speedway submits that this Court should remedy the current situation of widespread confusion over the meaning of section 4.33.3. As explained above, the issue is of significant importance to disabled persons as well as owners of sports stadiums and arenas, and concert venues. Numerous cases are filed and litigated each year based upon the uncertain language of section 4.33.3. A uniform rule is both warranted and urgently needed.

CONCLUSION

This Court should grant this petition.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert Miller, *Plaintiff-Appellant*, v. The California Speedway Corporation, *Defendant-Appellee*.	No. 06-56468 D.C. No. CV-01-00434-SGL OPINION

Appeal from the United States District Court for the Central District of California
Stephen G. Larson, District Judge, Presiding

Argued and Submitted
April 11, 2008 – Pasadena, California

Filed August 8, 2008

Before: William C. Canby, Jr. and Jay S. Bybee, Circuit Judges, and Roger Hunt,* District Judge.

Opinion by Judge Bybee

COUNSEL

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* The Honorable Roger Hunt, Chief United States District Judge for the District of Nevada, sitting by designation.

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OPINION

BYBEE, Circuit Judge:

Appellant Robert Miller is a big fan of NASCAR, attending from three to six events a year at the California Speedway in Fontana. He also happens to be a quadriplegic who uses an electric wheelchair. When the fans immediately in front of Miller stand during the most exciting parts of the race, they block his view of the action.

Appellee California Speedway Corporation ("Speedway") opened the California Speedway in 1997. The track and stadium, which sponsors NASCAR events, has two areas for wheelchairs in the grandstands; the cheaper seats are located at the bottom of the stadium, and the more expensive seats are located near the top. Miller always purchases tickets for the top row.

Miller brought this suit, claiming that Speedway has violated Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq.*, and a Department of Justice regulation requiring that wheelchair areas "provide people with physical disabilities . . . lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, App. A, § 4.33.3 (italics omitted). The district court granted Speedway's motion for summary judgment on the ground that the DOJ regulation does not address the question of lines of sight over standing spectators. *Miller v. California Speedway Corp.*, 453 F. Supp. 2d 1193, 1204 (C.D. Cal. 2006).

As the district court noted, two federal courts of appeals and two federal district courts have addressed this precise question and have reached opposite conclusions. The Third Circuit and the District of Oregon concluded that the DOJ's regulation does not require lines of sight over standing spectators. *Caruso v. Blockbuster-Sony Music Entm't Centre at the Waterfront,* 193 F.3d 730, 736-37 (3rd Cir. 1999); *Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 742-43 (D. Oregon 1997). By contrast, the D.C. Circuit and the District of Minnesota found that the DOJ's regulation does require lines of sight over standing spectators. *Paralyzed Veterans of America v. D.C. Arena L.P.,* 117 F.3d 579, 587 (D.C. Cir. 1997); *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1269 (D. Minn. 1997). We agree with the D.C. Circuit and reverse the judgment of the district court.

I. FACTS AND PROCEEDINGS BELOW

A. *The Regulatory Scheme*

1. The Americans With Disabilities Act

[1] Title III of the ADA prohibits discrimination against any individual "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). Discrimination includes "a failure to remove architectural barriers" or "where . . . removal of a barrier . . . is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods." 42 U.S.C. § 12182(b)(2)(A)(iv), (v). The ADA further requires that newly constructed facilities be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1). The ADA directs the Attorney General to "issue regulations . . . that include standards applicable to facilities" covered by Title III and to provide "appropriate technical assistance manuals to individuals or entities with rights or duties" under Title III. 42 U.S.C. §§ 12186(b), 12206(c)(3). Congress instructed the Attorney General to issue regulations within one year of the enactment of the ADA. 42 U.S.C. § 12186(b).

[2] The process by which the Attorney General promulgates his regulations has an unusual twist. Congress mandated that the Attorney General's regulations "be consistent with the minimum guidelines

and requirements issued by the Architectural and Transportation Barriers Compliance Board," 42 U.S.C. § 12186(c), commonly referred to as the "Access Board." The Access Board is an independent federal agency comprised of twenty-five persons – thirteen presidentially-appointed individuals and representatives from twelve federal agencies, including the DOJ. 29 U.S.C. § 792(a)(1). The Board is directed to establish "minimum guidelines and requirements for the standards issued" under Title III of the ADA, 29 U.S.C. § 792(b)(3)(B), and to "develop advisory information for, and provide appropriate technical assistance to, individuals or entities with rights or duties under regulations prescribed" under Title III, 29 U.S.C. § 792(b)(2). In sum, the Board establishes "minimum guidelines" for Title III, but the DOJ promulgates its own regulations, which must be consistent with – but not necessarily identical to – the Board's guidelines. Congress instructed the Board to issue its guidelines within nine months of the enactment of the ADA. 42 U.S.C. § 12204(a).

2. The Access Board Guidelines and DOJ Standards

In January 1991, six months after the enactment of the ADA, the Access Board published its first proposed ADA Accessibility Guidelines, known as the ADAAG. 56 Fed. Reg. 2296 (1991). Initially, the provision discussing assembly areas provided:

> 4.33.3 Placement of Wheelchair Locations. Wheelchair areas shall be an integral part of

> any fixed seating plan and shall be dispersed throughout the seating area. They shall . . . be located to provide lines of sight comparable to those for all viewing areas.

56 Fed. Reg. at 2380. In commentary on its proposed rules, the Access Board noted that the "lines of sight" requirement

> appears to be adequate for theaters and concert halls, but may not suffice in sports areas or race tracks where the audience frequently stands throughout a large portion of the game or event. In alterations of existing sports arenas, accessible spaces are frequently provided at the lower part of a seating tier projecting out above a lower seating tier or are built out over existing seats at the top of a tier providing a great differential in height. These solutions can work in newly constructed sports arenas as well, if sight lines relative to standing patrons are considered at the time of initial design. The Board seeks comments on whether the full lines of sight over standing spectators in sports arenas and other similar assembly areas should be required.

56 Fed. Reg. at 2314.

One month later, in February 1991, the DOJ published its own Notice of Proposed Rulemaking. 56 Fed. Reg. 7452 (1991). With respect to the standards for new construction and alterations, the proposed rules stated that the standards would be published as Appendix A, and that Appendix A would be the

ADAAG proposed by the Access Board in its January 1991 notice of proposed rulemaking, together "with any amendments made by the [Access Board] during its rulemaking process." 56 Fed. Reg. at 7478, 7492. "The Department proposes to adopt these guidelines as the accessibility standard applicable under this rule." 56 Fed. Reg. at 7478-79. The DOJ requested that any comments on the Access Board's notice of proposed rulemaking be sent to the Access Board. 56 Fed. Reg. at 7479.

In July 1991, the Access Board published its final ADAAG. 56 Fed. Reg. 35,408 (1991). Section 4.33.3 was modified to read, "Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public." 56 Fed. Reg. at 35,514 (italics omitted). The Board addressed the problem of "lines of sight over standing spectators in sports arenas and other similar assembly areas" and noted that "[m]any commenters also recommended that lines of sight should be provided over standing spectators." 56 Fed. Reg. at 35,440. To this, the Access Board simply stated that "the issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities," *id.*, guidelines the Access Board, evidently, had not proposed.

The very same day that the Access Board finalized its guidelines, the DOJ issued its final Title III regulations. 56 Fed. Reg. 35,544 (1991). As the DOJ

had previously announced, it "adopt[ed] the ADAAG as the accessibility standard applicable under this rule." 56 Fed. Reg. at 35,585. The DOJ incorporated the ADAAG – including § 4.33.3 - verbatim in Appendix A. *See* 28 C.F.R. 36.406 & App. A. The commentary accompanying the regulations stated that the "[DOJ] put the public on notice, through the proposed rule, of its intention to adopt the proposed ADAAG, with any changes made by the Board, as the accessibility standards." 56 Fed. Reg. at 35,586. The DOJ further indicated that "comments on the Department's proposed rule . . . have been addressed adequately in the final ADAAG. Largely in response to comments, the Board made numerous changes from its proposal." *Id.* The DOJ did not expressly address lines of sight.

3. The DOJ's *Technical Assistance Manual*

Title III's new construction provisions, including § 4.33.3, became effective in January 1993. That same year, pursuant to Title III's directive to provide technical assistance to covered entities, the DOJ published a *Technical Assistance Manual* ("TAM"). *See* 42 U.S.C. § 12206(a), (c)(2)(C). The 1993 TAM was silent on § 4.33.3. The 1994 published supplement to the TAM, however, provided an interpretation for § 4.33.3 that was more aggressive than the Access Board's commentary:

> In addition to requiring companion seating and dispersion of wheelchair locations, ADAAG requires that wheelchair locations

> provide people with disabilities lines of sight comparable to those for members of the general public. Thus, in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand. This can be accomplished in many ways, including placing wheelchair locations at the front of a seating section, or by providing sufficient additional elevation for wheelchair locations placed at the rear of seating sections to allow those spectators to see over the spectators who stand in front of them.

TAM § III-7.5180 (1994 Supp.).

4. The Access Board's Subsequent Guidelines

In 1992, the Access Board repeated its intent "to address the issue of lines of sight over standing spectators in the guidelines for recreational facilities which will be proposed at a future date." 57 Fed. Reg. 60,612, 60,618 (1992). It requested "comments on the design issues associated with providing integrated and dispersed accessible seating locations with a clear line of sight over standing spectators in arenas, stadiums or other sports facilities." *Id.* The Access Board also noted that during the initial notice and comment procedures "[a]n overwhelming majority of responses favored including a provision requiring lines of sight over standing spectators in sports arenas and other similar assembly areas." *Id.*

In November 1999, the Access Board finally proposed amendments to its guidelines to address the standing spectators problem. 64 Fed. Reg. 62,248, 62,501-02 (1999). These were adopted in July 2004. 69 Fed. Reg. 44,083 (2004). Guideline 802.2 now distinguishes between "lines of sight over seated spectators" and "lines of sight over standing spectators." 69 Fed. Reg. at 44,391-93. Guideline 802.2.2.1 reads: "Where standing spectators are provided lines of sight over the heads of spectators standing in the first row in front of their seats, spectators seated in *wheelchair spaces* shall be afforded lines of sight over the heads of standing spectators in the first row in front of *wheelchair spaces*." 69 Fed. Reg. at 44,392-93. The DOJ has not adopted the Access Board's 2004 guidelines. Instead, the DOJ's current regulation of lines of sight requirements remains 28 C.F.R. pt. 36, App. A, § 4.33.3, as interpreted by TAM § III-7.5180 (1994 Supp.).[1]

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[1] The DOJ has informed us that on June 17, 2008, the DOJ published proposed regulations that would amend the DOJ's ADA regulations. 73 Fed. Reg. 34,508 (2008). The proposed regulations would adopt the Access Board's 2004 guidelines, including Guideline 802.2.2.1, which requires lines of sight over standing spectators. The regulations have not yet been adopted, and, even if adopted, will not apply retroactively. We understand that these are clarifying regulations, not an admission that the DOJ's original guidelines did not require lines of sight over standing spectators.

B. *The Proceedings*

On October 25, 2001, Miller filed his district court complaint, alleging, among other things, that Speedway violated Title III of the ADA, 42 U.S.C. § 12181 *et seq.* On cross motions for summary judgment, the district court granted judgment for Speedway. The court acknowledged that "the DOJ's current position on ADAAG § 4.33.3 is reasonable" and was consistent with Title III of the ADA and that "[w]ere the [c]ourt to write on a clean slate, the [c]ourt would be tempted to hold that § 4.33.3 requires lines of sight over standing spectators." *Miller,* 453 F. Supp. 2d at 1198, 1204. It found, however, that the DOJ had bound itself to the Access Board's commentary implying that the Access Board's 1991 guidelines (and, consequently, the DOJ's 1991 standards) did not address the question of lines of sight over standing spectators. *Id.* at 1203. Accordingly, the court concluded that the DOJ's current position – found in the 1994 Supplement to the TAM – that facilities must provide lines of sight over standing spectators was "'a fundamental modification of its previous interpretation'" and had to be adopted through notice-and-comment rulemaking. 453 F. Supp. 2d at 1201 (quoting *Paralyzed Veterans of America,* 117 F.3d 579, 586 (D.C. Cir. 1997)). It thus rejected the D.C. Circuit's interpretation in *Paralyzed Veterans* and agreed with the Third Circuit's opinion in *Caruso v. Blockbuster-Sony Music Entertainment Centre,* 193 F.3d 730 (3d

Cir. 1999). *Miller*, 453 F. Supp. 2d at 1203. Miller appeals.[2]

II. ANALYSIS

We begin our analysis by stating what is *not* at issue in this case. This case does not involve whether the DOJ has reasonably interpreted the ADA within the meaning of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). No party to the litigation challenges the substantive validity of § 4.33.3, and sensibly, no party has argued that the DOJ has exceeded its authority under the ADA. Nor is § 4.33.3 subject to serious challenge as "arbitrary and capricious." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (1983). Although this is a private suit by Miller against the Speedway for violating the ADA, the parties all concede that the Attorney General's lines-of-sight regulations would clearly pass muster if challenged under the ADA. *See Indep. Living Res.*, 982 F. Supp. at 734 ("DOJ reasonably could have concluded that lines of sight over standing spectators are necessary. . . . The ADA provides ample legal authority to support such a requirement."); *see also Paralyzed Veterans*, 117 F.3d at 582-83 ("[A]ppellants do not

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[2] A district court's grant of summary judgment is reviewed *de novo*. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). There are no genuine issues of material fact, so our sole inquiry is whether the district court correctly applied the law. *Id.*

contend that the Department's interpretation of the regulation is unfaithful to the governing statute.").

A. *The TAM as the DOJ's Interpretation of Its Own Regulation*

[3] What is challenged here is whether the lines-of-sight provision in the Attorney General's 1994 Supplement to the TAM is a valid construction of § 4.33.3. While *Chevron* addresses what kind of deference we must afford an agency in the interpretation of the *statute* it has been charged with enforcing, *see* 467 U.S. at 842, here we are dealing with the leeway we must grant an agency in the interpretation of its own *regulations*. We must give an agency's interpretation of its own regulations "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). "In other words, we must defer to the [agency's] interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)). We have explained that "[w]hen the meaning of regulatory language is ambiguous, the agency's interpretation controls 'so long as it is "reasonable," that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulations.'" *Or. Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1131 (9th Cir.

2003) (quoting *Martin v. Occupational Safety & Health Review Comm'n,* 499 U.S. 144, 150-51 (1991)).

Furthermore, we have previously held that the TAM itself is entitled to substantial deference. "The guidance provided in the technical assistance manual is an interpretation of the DOJ's regulation and, as such, is entitled to significant weight as to the meaning of the regulation." *Disabled Rights Action Comm. v. Las Vegas Events, Inc.,* 375 F.3d 861, 875-76 (9th Cir. 2004) (citations omitted). Where "[t]he DOJ's interpretation [in the TAM] is entirely consistent with the regulation, . . . it is due deference." *Botosan v. Paul McNally Realty,* 216 F.3d 827, 834 (9th Cir. 2000). Accordingly, "[t]he Justice Department's interpretation of its own regulations, such as the Technical Assistance Manual, must also be given substantial deference and will be disregarded only if 'plainly erroneous or inconsistent with the regulation.'" *Bay Area Addiction Research v. City of Antioch,* 179 F.3d 725, 732 n.11 (9th Cir. 1999) (quoting *Thomas Jefferson Univ.,* 512 U.S. at 512).

[4] The language of § 4.33.3 requiring "lines of sight comparable to those for members of the general public" is ambiguous. Indeed, both the Third and the D.C. Circuits, although they ultimately reach opposite conclusions on the merits, agree that the plain language of the regulation is ambiguous and subject to differing interpretations. *See Caruso,* 193 F.3d at 733 ("In the end it seems that both interpretations of the 'lines of sight' language are plausible."); *Paralyzed Veterans,* 117 F.3d at 583 ("the phrase is ambiguous").

We agree that the phrase "lines of sight" in § 4.33.3 is subject to several interpretations.

One possible interpretation is that the phrase means that wheelchair patrons must have a view without physical obstructions. *See Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788-89 (5th Cir. 2000). We have already held that this reading is too narrow to be compelled by the language of § 4.33.3, and the Attorney General is entitled to read the provision more broadly. *Regal Cinemas*, 339 F.3d at 1132.

A more plausible interpretation of the phrase is that it means that wheelchair areas are to be dispersed throughout a facility, such that wheelchair users have a variety of horizontal viewing angles from which to choose. *See Caruso*, 193 F.3d at 732. This ensures that wheelchair patrons at a football game are not all stuck, for example, behind the goalposts. This interpretation is supported by the fact that § 4.33.3 also requires a "choice of admission prices" to account for the difference between an end zone and a mid-field seat.

Alternatively, the phrase can be read to require more than horizontal dispersal; it could be read to require vertical dispersal as well, so that patrons have a choice of seats – for example, between the orchestra and the loges – to obtain a different viewing angle. Under this reading, the phrase "lines of sight" would refer to the angle of sight between the viewer and the stage, screen, or playing field. The latter definition of "lines of sight" would encompass both the

notion of a horizontal line of sight and a vertical line of sight.

Finally, yet another interpretation does not merely involve the horizontal or vertical dispersal of the wheelchair seating options, but rather suggests that the line of sight of a wheelchair patron must be comparable to the line of sight of a non-wheelchair patron who has chosen the same seat. Under this interpretation it is easy to see that at some events (principally sporting events), a "comparable" line of sight would encompass an unobstructed line of sight when other patrons are standing. When the crowd is generally standing, most spectators can also stand and, in doing so, enable themselves to substantially see the event. Therefore, in order to be given a comparable line of sight, wheelchair users must also be able to see the event when the crowd is standing.

Any of these interpretations would be a reasonable reading of the ambiguous plain language of the regulation. In fact, the phrase "lines of sight comparable to those for members of the general public" could be interpreted to require a combination of the proposed interpretations. That is, it is possible that a comparable line of sight means that the view is unobstructed by physical obstacles, that the seats must be horizontally and vertically dispersed, and that wheelchair patrons must be able to see over standing patrons.

[5] In its 1994 supplement to the TAM, the DOJ made it clear that at the very least the phrase "lines

of sight comparable to those for members of the general public" in § 4.33.3 required that "in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand." TAM § III-7.5180 (1994 Supp.). The Attorney General's interpretation of § 4.33.3 is "neither plainly erroneous [n]or inconsistent with the regulation." *Thomas Jefferson Univ.*, 512 U.S. at 512. As a linguistic matter it is perfectly reasonable to interpret the term "lines of sight comparable to those for members of the general public" as requiring lines of sight that are comparable in the actual conditions under which a facility operates. If spectators are widely expected to stand during the key moments of an event, then comparable lines of sight for wheelchair users could be lines of sight that enable the wheelchair users to see during those moments. If the spectators stand during the singing of the national anthem, routinely jump to their feet during the fourth quarter, or insist on standing on their chairs during the third overtime, it does not take a fertile legal imagination to understand that relatively immobile patrons will not have a comparable line of sight.

[6] Furthermore, the DOJ's 1994 interpretation is consistent with the statutory requirement that the facilities be "readily accessible to" and "usable by" persons with disabilities. 42 U.S.C. § 12183(a)(1). To meaningfully use the Speedway facilities, a wheelchair patron needs to be able to see the event in the circumstances under which the race typically takes

place, with a standing audience. Otherwise the Speedway race track is not "usable" as a practical matter. Because the DOJ's interpretation is a reasonable, practical construction in light of the ambiguity of the regulation, it is entitled to substantial deference.

Our decision is consistent with our treatment of the DOJ's "comparable lines-of-sight" regulations in the context of theater seating in *Regal Cinemas,* 339 F.3d at 1127. The district court had held that "the language about 'lines of sight comparable to those for members of the general public' in § 4.33.3 does not require that wheelchair-accessible seating afford patrons comparable viewing angles to those in non-accessible seating." *Id.* at 1129 (citing *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc.,* 142 F. Supp. 2d 1293, 1297-98 (D. Or. 2001)). The district court had followed *Lara v. Cinemark USA, Inc.,* 207 F.3d 783 (5th Cir. 2000), in which the Fifth Circuit pointed out that "questions regarding 'viewing angle' did not arise until well after the DOJ promulgated section 4.33.3" and concluded that "lines of sight" referred to nothing more than "unobstructed views." *Id.* at 788-89.

[7] We rejected the Fifth Circuit's reasoning and reversed the district court. We concluded that "lines of sight" "[i]n the context of a movie theater, [ ] means a line extending from the viewer's eye to the points on the screen where the film is projected, taking into account the angle from the viewer's eye to those points." *Regal Cinemas,* 339 F.3d at 1131. We framed

the question as "whether it is unreasonable for DOJ to interpret 'comparable line of sight' to encompass factors in addition to physical obstructions, such as viewing angle. The answer, in light of the plain meaning of the regulation both in general and as understood in the movie theater industry, is 'no.'" *Id.* at 1132. Accordingly, we held that DOJ's interpretation of § 4.33.3 was "valid and entitled to deference." *Id.* at 1133.

[8] A sporting event presents a different set of challenges from a movie theater, which has a fixed screen and relatively placid patrons. By contrast, sporting events typically involve live action, moving rapidly over playing surfaces many times larger than a movie screen. When the audience – like the athletes – is in motion, arena designers, owners and patrons have a set of problems to address that are not present in a theater setting. It was not unreasonable for the DOJ to interpret "lines of sight" as the actual "line extending from the viewer's eye to the [playing field], taking into account the angle from the viewer's eye to those points." *Id.* at 1131.

B. *The TAM as the DOJ's Own Interpretation of the Access Board Guidelines*

[9] As in *Lara*, a decision we declined to follow in *Regal Cinemas*, the Speedway argues that the DOJ's position is an after-acquired view, one that "did not arise until well after the DOJ promulgated section 4.33.3." *Lara*, 207 F.3d at 788-89. Indeed, the

Speedway argues not just that the DOJ's position is an after-acquired view, but that the DOJ's position on lines of sight in the 1994 TAM supplement substantially departs from the Access Board's original commentary on lines of sight. Asserting that the Access Board's commentary must be imputed to the DOJ, the Speedway contends that the DOJ's subsequent position is not entitled to substantial deference because it was not promulgated according to notice and comment rulemaking.

The district court in this case agreed that "the board's commentary must be imputed to the DOJ," although it also observed that if it were "to write on a clean slate, [it] would be tempted to hold that § 4.33.3 requires lines of sight over standing spectators." 453 F. Supp. 2d at 1203-04. In *Caruso,* the Third Circuit took a similar position, relying on

> the following factors: 1) the DOJ referred all comments to the Boards; 2) the DOJ relied on the Board to make adequate changes based on those comments; 3) the Board specifically changed the language of 4.33.3 in response to comments and explained that change in its commentary; 4) the DOJ was a 'member of the board' and 'participated actively . . . in preparation of both the proposed and final versions of the [guidelines]'; and 5) the DOJ's commentary stated that the final guidelines promulgated by the Board adequately addressed all comments.

Caruso, 193 F.3d at 736 (citations omitted).

The district court's point, supported by *Caruso,* is a fair one. *See Thomas Jefferson Univ.,* 512 U.S. at 512 (we must defer "unless an alternative reading is *compelled* by other indications of the Secretary's intent *at the time of the regulation's promulgation*") (emphasis added; citation omitted). After all, in its notice of proposed rulemaking, the DOJ stated that it "propose[d] to adopt [the Access Board's] guidelines as the accessibility standard under this rule." 56 Fed. Reg. at 7478-79. The same day as the Access Board published its standards, the DOJ formally "adopt[ed] the ADAAG as the accessibility standard" as its own. 56 Fed. Reg. at 35,585, and on that day, the Access Board stated that "the issue of lines of sight over standing spectators will be addressed [in the future] in guidelines for recreational facilities." 56 Fed. Reg. at 35,440.

[10] We understand why a reasonable reader might conclude that as of July 1991, the DOJ's new ADA regulations did not address lines of sight over standing spectators. We do not think, however, that such a reading is "compelled" by the record. *See Thomas Jefferson Univ.,* 512 U.S. at 512. When the DOJ adopted the Access Board's guidelines as its own standards, it literally adopted the *guidelines.* 28 C.F.R. § 36.406(a) ("New construction and alterations subject to this part shall comply with the standards for accessible design published as appendix A to this part (ADAAG)."). It did not adopt any other Access Board commentary, notices of proposed rulemaking, or internal memoranda. Whatever the *Access Board*

thought of its own guidelines, the *Department of Justice* adopted the text of the guidelines themselves, not the Access Board's interpretation of that text. The DOJ made the Access Board's guidelines its own, and, having done so, it assumed responsibility for interpreting the standards.[3] As the Access Board has explained: "The Board's guidelines serve as the baseline for standards used to enforce the ADA and the ABA. These standards, which are maintained by other Federal agencies, such as the U.S. Department of Justice under the ADA, will be updated according to the new guidelines. *It is these standards, not the Board's guidelines, which the public must follow.*" U.S. Access Board, *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines* n.p. (2004) ("Introduction") (emphasis added).

[11] There was good reason for the DOJ to adopt the text of the Access Board's guidelines. The ADA instructed the Access Board to issue minimum guidelines within nine months of enactment and ordered the Attorney General to issue regulations within one year. 42 U.S.C. §§ 12186(b), 12204(a). By Washington

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[3] The Access Board has explained the difference between its "guidelines" and the Attorney General's "standards": "Guidelines are issued by the Board, standards by designated agencies such as DOJ. . . . ADA standards issued by DOJ . . . in 1991 based on the Board's original ADA Accessibility Guidelines (ADAAG) remain the standards to follow at this time." U.S. Access Board, *Americans with Disabilities Act and Architectural Barriers Act Accessibility Guidelines* n.p. (2004) ("Answers to Common Questions About the New ADA-ABA Guidelines").

standards, this required quick work. The Access Board's dutiful response to the mandate enabled the DOJ to get its own regulations into print on time. More importantly, the ADA mandated that the DOJ's regulations "be consistent with the minimum guidelines and requirements issued by the [Access Board]." 42 U.S.C. § 12186(c). By formally adopting the Access Board's guidelines, the DOJ ensured that its own regulations were "consistent with" the Access Board's guidelines. It seems like an easy call for the Attorney General to piggyback on the Access Board's hard work at getting the ADA up and running. Those guidelines, however, were only a launching point for the DOJ, which had to take care that its own regulations complied with the Access Board guidelines at a "minimum." *Id.* Nothing in the ADA or in the DOJ's own regulations bound the Attorney General to the Access Board so long as the DOJ's regulations satisfied some "minimum" level of equivalence. The Attorney General was free to interpret the regulations in a manner that was more strict than contemplated by the Access Board. Therefore, the Access Board's commentary should not be imputed to the DOJ.

Once we admit that the line-of-sight regulations are ambiguous, that the DOJ did not bind itself to the Access Board's interpretation of the guidelines, and that the Attorney General was free to interpret the regulations in a manner that was more strict than the Access Board's guidelines, we have no difficulty in concluding that the Attorney General could resolve any ambiguity in the DOJ's regulations by taking a

stricter view of § 4.33.3 than the Access Board did when it adopted its guidelines. The DOJ did not have to wait for the Access Board to act.

Indeed, the DOJ demonstrated its independence at a very early stage. The DOJ's regulations became effective in January 1993, and it issued its first TAM that year, as required by 42 U.S.C. § 12206(c)(3). The first TAM did not address the standing spectator problem. The following year, in 1994, the DOJ published a supplement to the TAM and offered its first formal interpretation of the line-of-sight rule in § 4.33.3: "in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand." TAM § III 7.5180 (1994 Supp.). The guidance in the TAM itself is plain; its relationship to § 4.33.3, obvious.

C. *The TAM as the DOJ's Modification of Its Own Interpretive Rules*

Even if we were persuaded that the DOJ initially adopted the Access Board's interpretation that § 4.33.3 simply did not address the problem of standing spectators, the DOJ may change its mind. "The [Attorney General] is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation. . . . [W]here the agency's interpretation of [its regulation] is at least as plausible as competing ones, there is little, if any reason not to defer to its construction." *Good Samaritan Hosp. v.*

Shalala, 508 U.S. 402, 417 (1993). The only question is whether, in order to effectuate the change, the DOJ had to proceed through notice and comment.

[12] We think that, even if the DOJ's interpretation constituted a change in the understanding of its original regulations, the DOJ was not required to proceed by notice and comment because both the Access Board's original position (as imputed to the DOJ) and the TAM would constitute interpretive rules. *See* 5 U.S.C. § 553(b)(3)(A); *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004) (holding that an agency can modify an interpretive rule without notice and comment). An interpretive rule is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (quotation marks and citation omitted). "[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule," whereas legislative rules "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003).

[13] In one sense, the 1994 Supplement to the TAM imposed obligations that might not have been anticipated. We understand how, from the perspective of facility owners such as Speedway, the 1994 Supplement appears to be a legislative rule. On the other hand, the 1994 Supplement added nothing to the existing rule except a definition of an ambiguous

term; it merely clarified the DOJ's view of the scope of § 4.33.3. That is the purpose of an interpretive rule. A rule does not become a legislative rule because it effects some unanticipated change; otherwise, only superfluous rules could qualify as interpretive rules. *See Erringer*, 371 F.3d at 632 (rejecting the argument that notice and comment must apply "where one unpublished policy is replaced by a revised version of that policy that significantly affects members of the public.") We do not think that interpretive rules must be so useless. In sum, we conclude that the 1994 Supplement to the TAM was an interpretive rule and, even if it reflected a change in the DOJ's thinking about comparable lines of sight, it was a reasonable interpretation of an ambiguous regulation that did not require notice and comment prior to publication.

III.

The regulatory scheme at issue in this case is complex, but our conclusion is simple: the DOJ's interpretation of its own regulation is reasonable and therefore entitled to substantial deference. The judgment is REVERSED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT MILLER, Plaintiff v. THE CALIFORNIA SPEEDWAY CORPORATION, Defendant.	Case No. EDCV 01-00434 SGL ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed Sep. 8, 2006)

This matter is before the Court on the parties' cross-Motions for Summary Judgment (plaintiff's, filed on January 30, 2006, and defendant's, filed on January 31, 2006). The Court has read and considered the moving, opposition, and reply documents, as well as an evidentiary objection and the parties' evidence. The Court has also considered an Amicus Brief, filed by the United States Department of Justice on June 9, 2006, and defendant's Reply thereto. The matter was heard on August 28, 2006. Pursuant to the evidence presented and arguments offered by the parties, the Court issues the following order **DENYING** plaintiff's Motion for Summary Judgment and **GRANTING** defendant's Motion for Summary Judgment.

I. Nature of the Case and Issue Presented

This action is brought pursuant to Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12189, and arises out of the inability of a wheelchair-bound NASCAR race spectator to see over the heads and bodies of ambulatory spectators who stand during the exciting parts of NASCAR races. In addition to the ADA claim, plaintiff brings similar state-law claims.

The undisputed facts presented by this action require the Court to determine what deference, if any, should be given to the Department of Justice's ("the DOJ") interpretation of a provision of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). *See* 28 C.F.R., Pt. 26, Appdx. A, § 4.33.3 (hereinafter "ADAAG" § 4.33.3). Specifically, this case addresses the deference to be given the DOJ's interpretation of ADAAG § 4.33.3, which reads: "Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public." The DOJ has interpreted § 4.33.3 to mean that, "in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand." 1994 Supplement, DOJ *Technical Assistance Manual*, § III-7.5180 (hereinafter "1994 TAM Supplement").

In the end, the Court determines that, as a matter of law, it may ***not*** give deference to the DOJ's current position on § 4.33.3, as expressed in the 1994 TAM Supplement. Moreover, because the DOJ's 1994 interpretation imposing the "lines of sight" requirement was adopted without the requisite notice-and-comment period mandated by the Administrative Procedure Act ("APA"), the interpretation, and thus the requirement, must be rejected in favor of the DOJ's original interpretation that failed to impose the "lines of sight" requirement.

II. Objection to Evidence

Defendant objects to plaintiff's expert's declaration in which the expert offers an opinion that defendant argues amounts to a conclusion of law. *See* Bishop Decl. ¶ 8 ("It is my expert opinion that the upper[-]level wheelchair seating area does not provide wheelchair patrons a line of sight over standing spectators."). Defendant's objection is overruled. Although Bishop uses the same phrase as the regulation, "line of sight," it is clear in context that Bishop is not making a conclusion of law; rather, Bishop merely offers the opinion that, based on his examination of the site, plaintiff, when using his wheelchair, would be unable to see the track over standing spectators. Therefore, the opinion addresses a matter of fact.

By contrast, defendant's expert offers a conclusion of law. *See* Gibbens Decl. ¶ 7 ("In my on-site

inspection of THE CALIFORNIA SPEEDWAY, as well as review of diagrams of the [S]peedway, I agree that the subject seating does in fact comply with the applicable provisions of the [Americans with Disabilities Act Accessibility Guidelines] and the [California Building Code] and that plaintiff's allegations are without merit. . . . [P]laintiff's contention that he is entitled to an unobstructed line of sight over the heads of standing spectators is without merit.").

The Court will draw its own conclusions of law.

III. Uncontroverted Facts

Defendant, the California Speedway Corporation ("the Speedway"), operates a racing track located in Fontana, California. The Speedway is a track and stadium facility that is open to and sells tickets to the public for events such as NASCAR racing. The Speedway was built after January, 1993.

Plaintiff Robert Miller is disabled and uses a wheelchair for mobility. Specifically, plaintiff became a quadriplegic after an injury severed his spinal cord at the C5/C6 vertebra level.

Each year since the Speedway opened in 1997, plaintiff has attended three to six of its NASCAR races.

The Speedway has wheelchair spaces located on the upper level of the Speedway. When plaintiff occupies these spaces in his wheelchair, he is unable to see over the ambulatory spectators in the rows in

front of him when those spectators stand.[1] Not surprisingly, the ambulatory spectators tend to stand up to see the more exciting parts of the race, making it impossible for plaintiff to see "the part of the race [he] wants to see the most." Miller Depo. at 27.

IV. Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. Rule Civ. P. 56(c).

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[1] Plaintiff offers his declaration and photographs taken by him as evidence on this point. Plaintiff also offers the declaration of his expert, who is of the opinion that, based on his examination of the site and an analysis that employed the use of industry standard "average anthropomorphic dimensions," plaintiff is unable to see the track over standing spectators. In response, defendant offers evidence, in the form of an expert declaration and photographs taken by its expert, purporting to controvert this fact. The Gibbens declaration establishes that the wheelchair spaces plaintiff occupied are located on an elevated platform behind seating for ambulatory spectators, as illustrated by the accompanying pictures. However, the pictures are of an empty stadium, without any standing spectators, and it is unclear whether the photographs were taken from the angle which a wheelchair-bound spectator would view the stadium and track. This evidence fails to dispute plaintiff's testimony and photographic evidence that, from his eye-level while seated in his wheelchair, he is unable to see over spectators standing in front of him.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248.

If the moving party meets its initial burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Mere disagreement or the bald assertion that a genuine issue of material fact exists does not preclude the use of summary judgment. *Harper v. Wallingford,* 877 F.2d 728 (9th Cir. 1989).

V. Plaintiff's ADA Claim

A. ADA Title III

Title III of the ADA prohibits discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a). The ADA definition of "public accommodation" includes race tracks such as the Speedway. *See* 42 U.S.C. § 12181(7)(c) ("'Public accommodation' [includes] a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment. . . ."). Title III requires

that facilities constructed for first occupancy on or after January 26, 1993, be "readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable." 42 U.S.C. § 12183; 28 C.F.R. § 36.401(a)(1).

To implement these provisions, Congress directed the Department of Justice to "issue regulations . . . that include standards applicable to facilities" covered by Title III. 42 U.S.C. 12186(b). These standards must "be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board" ("Access Board").[2] 42 U.S.C. § 12186(c).

Pursuant to this statutory authority, the DOJ has issued voluminous regulations implementing Title III. *See generally* 28 C.F.R., part 36. Significant to this case is ADAAG § 4.33.3, which requires that wheelchair-bound spectators be afforded "lines of sight comparable to those for members of the general public." *Id.* Specifically, at issue in this case is whether the Court must give deference to the DOJ's position that § 4.33.3 requires that wheelchair spaces must be situated in such a manner as to give

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[2] The Access Board is a federal agency that was created by the Rehabilitation Act of 1973. *See* 29 U.S.C. § 792(a). The ADA required that the Access Board, within nine months of July 26, 1990, to issue "minimum guidelines" to supplement the Board's "existing Minimum Guidelines and Requirements for Accessible Design." 42 U.S.C. § 12204(a).

wheelchair-bound spectators a clear line of sight over standing spectators. *See Thomas Jefferson University v. Shalala,* 512 U.S. 504, 512 (noting that an agency's interpretation of its own regulation must be given deference so long as it is not "plainly erroneous or inconsistent" with the regulation).

B. The DOJ's Current Interpretation is Reasonable

Courts are required to "give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson University,* 512 U.S. at 512. In other words, the court need not "decide which among several competing interpretations best serves the regulatory purpose[; r]ather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotation marks and citations omitted).

Here, the Court is satisfied that the DOJ's current position on ADAAG § 4.33.3 is reasonable. Title III requires that public accommodations be "readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a). Title III also requires that persons with disabilities be afforded "the full and equal enjoyment of . . . public accommodation[s]." 42 U.S.C. § 12182(a). ADAAG § 4.33.3 requires that disabled individuals who use wheelchairs for mobility be afforded lines of sight that are comparable to non-disabled individuals. The DOJ's interpretation – that

wheelchair-bound spectators be afforded lines of sight over standing spectators at events where spectators are expected to stand – is wholly consistent with these provisions.

Moreover, although courts are divided on whether the DOJ's position must be given deference, *see infra,* no court to consider the issue has concluded that the DOJ's position is unreasonable. *See Paralyzed Veterans of America v. D.C. Arena L.P.,* 117 F.3d 579, 584-85 (D.C. Cir. 1997) (finding that ADAAG § 4.33.3 is "susceptible to [the DOJ's] present interpretation" and that it was therefore reasonable); *cert. denied,* 523 U.S. 1003 (1998); *United States v. Ellerbe Becket, Inc.,* 976 F. Supp. 1262, 1268-69 (D. Minn. 1997) (same); *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront,* 193 F.3d 730 (3d Cir. 1999) (noting that the DOJ's position is "plausible and . . . consistent with the ADA's purpose of enabling people with disabilities to share equally in the benefits provided by a public accommodation"); *Independent Living Resources v. Oregon Arena Corp.,* 982 F. Supp. 698 (D. Ore. 1997) (noting that "[t]he ADA provides ample legal authority to support" a requirement that public accommodations provide lines of sight over standing spectators during events at which spectators are expected (or even encouraged) to stand).

That the DOJ interpretation is reasonable, however, is not the end of the Court's inquiry. As the parties' arguments and relevant case law acknowledge, the analysis of whether the Court must defer to

the DOJ's position requires the Court to consider whether the interpretation represents "a fundamental modification of its previous interpretation." *Paralyzed Veterans of America,* 117 F.3d at 586; *see also Thomas Jefferson University,* 512 U.S. at 512 ("we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."). This determination begins with an examination of the unique procedural history behind § 4.33.3.

C. Procedural History of the Adoption of § 4.33.3

Section 4.33.3 is found in Appendix A to Title 28, part 36 of the Code of Federal Regulation. It reads:

> **Placement of Wheelchair Locations.** Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. They shall adjoin an accessible route that also serves as a means of egress in case of emergency. At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. . . .

Id. Without giving any notice and without eliciting any comments, the DOJ has since 1994 interpreted § 4.33.3 to require lines of sight over the heads of standing spectators:

> In addition to requiring companion seating and dispersion of wheelchair locations, [Standard 4.33.3] requires that wheelchair locations provide people with disabilities lines of sight comparable to those for members of the general public. Thus, in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand. This can be accomplished in many ways, including placing wheelchair locations at the front of a seating section, or by providing sufficient additional elevation for wheelchair locations placed at the rear of seating sections to allow those spectators to see over the spectators who stand in front of them.

1994 DOJ TAM § III-7.5180.

Standard 4.33.3 was first proposed by the Access Board on January 22, 1991. At that time, it stated: "Placement of Wheelchair Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be dispersed throughout the seating area. They shall . . . be located to provide lines of sight comparable to those for all viewing areas." Proposed Rules, Architectural and Transportation Barriers Compliance Board, 56 Fed. Reg. 2296-01, 2380 (Jan. 22, 1991). Accompanying proposed § 4.33.3

was a public notice regarding the proposed rule, inviting comments regarding the issue of lines of sight over standing spectators:

> Section 4.33.3 provides that seating locations for people who use wheelchairs shall be dispersed throughout the seating area and shall be located to provide lines of sight comparable to those for all viewing areas. This requirement appears to be adequate for theaters and concert halls, but may not suffice in sports arenas or race tracks where the audience frequently stands throughout a large portion of the game or event. In alterations of existing sports arenas, accessible spaces are frequently provided at the lower part of a seating tier projecting out above a lower seating tier or are built out over existing seats at the top of a tier providing a great differential in height. These solutions can work in newly constructed sports arenas as well, if sight lines relative to standing patrons are considered at the time of the initial design. The Board seeks comments on whether full lines of sight over standing spectators in sports arenas and other similar assembly areas should be required.

56 Fed. Reg. at 2314.

A month later, on February 22, 1991, the DOJ published a notice in which it proposed to adopt the Access Board's Proposed Guidelines "with any amendments made by the [Access Board] during the rulemaking process." Proposed Rules, Department of

Justice, 56 Fed. Reg. 7452-01, 7478-79 (Feb. 22, 1991). The DOJ notice stated that "any comments" on the Access Board's Proposed Guidelines should be sent directly to the Board. *Id.* at 7479.

Five months later, on July 26, 1991, the Access Board published its proposed final guidelines, including comments regarding proposed § 4.33.3 with respect to the issue of lines of sight over standing spectators:

> Comment. The [Board] asked questions regarding . . . lines of sight over standing spectators in sports arenas and other similar assembly areas. . . . Many commenters . . . recommended that lines of sight should be provided over standing spectators. Response. . . . The issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities.

Rules and Regulations, Architectural and Transportation Barriers Compliance Board, 56 Fed. Reg. 35408-01, 35440 (July 26, 1991).

On the same day that the Access Board issued its proposed guidelines, including the above comment, the DOJ promulgated § 4.33.3, which is worded identically to the Access Board's final proposed text. The DOJ did not explicitly adopt the Board's commentary, but instead issued this general statement:

> The Department put the public on notice, through the proposed rule, of its intention to adopt the proposed [guidelines], with

> any changes made by the Board, as the accessibility standards. As a member of the Board and of its ADA Task Force, the Department participated actively in the public hearings held on the proposed guidelines and in preparation of both the proposed and final versions of [the guidelines.] . . . [All] comments on the Department's proposed rule . . . have been addressed adequately in the final [guidelines]. Largely in response to comments, the Board made numerous changes from its proposal.

Rules and Regulations, Department of Justice, 56 Fed. Reg. 35544-01, 35585 (July 26, 1991).

D. Defendant's Argument that the DOJ's Current Position is Inconsistent with its Previous Position

Defendant argues that, based on this link between the DOJ and the Board in the rulemaking process, along with the DOJ's adoption of the text of § 4.33.3 (and its general statement approving of the Board's changes to the proposed guidelines), the Board's commentary regarding the intent to address the issue of standing spectators at a future date must be imputed to the DOJ. Therefore, under defendant's reasoning, the DOJ's position at the time of the promulgation of § 4.33.3 was that it did not address the issue of standing spectators – a position it was not free to change in 1994 without first going through the notice-and-comment procedure required by APA. *See* 5 U.S.C. § 553; *Paralyzed Veterans,* 117 F.3d at

579 ("To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine [the] APA requirements."); *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 88 (1995) ("APA rulemaking would still be required if [an agency] adopted a new position inconsistent with any of the [agency's] existing regulations.").

The four courts that have considered this issue are split down the middle. *See Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (Board commentary not binding on DOJ; DOJ's position on § 4.33.3 is entitled to deference), *cert. denied*, 523 U.S. 1003 (1998); *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997) (same); *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730 (3d Cir. 1999) (DOJ "implicitly adopted" the Board's commentary; DOJ's position on § 4.33.3 is not entitled to deference); *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698 (D. Ore. 1997) (attributing Board's commentary to the DOJ; DOJ's position is not entitled to deference). A brief review of these opinions is helpful to the Court's analysis.

In *Paralyzed Veterans*, a group of paralyzed veterans brought suit against an athletic arena to require the arena to provide lines of sight over standing spectators. *Id.* at 580. The court began its analysis with an acknowledgment that agency interpretations are generally given deference, so long as they are reasonable. *Id.* at 584. Because the court concluded

that § 4.33.3 could plausibly be interpreted in the manner suggested by the DOJ, it was reasonable. *Id.* at 584-85. This conclusion, however, did not end the inquiry, because the court was required to consider whether the DOJ's current position was "a fundamental modification of its previous interpretation" that would require formal modification through the notice-and-comment process. *Id.* at 586; 5 U.S.C. § 553(b)-(c) (requiring notice be given and comment be permitted before an agency engaged in "rule making"); 5 U.S.C. § 551(5) (defining "rule making" to include "repeal" and "amendment").

The court determined that the Board's commentary should not be attributed to the DOJ; although it acknowledged that it was plausible that the DOJ, at the time of § 4.33.3's adoption, held the same position on standing spectators as did the Board, the court also acknowledged that this was not the only reasonable inference to be drawn. *Paralyzed Veterans,* 117 F.3d at 587. In the end, although conceding "the issue [is] not easy," the court reasoned that the Board's commentary should not be attributed to the DOJ because (1) the DOJ did not explicitly adopt the commentary; (2) it did not comment on the Board's concerns regarding standing spectators; (3) it did not imply the regulation did not address the issue of standing spectators, and (4) because the DOJ was required only to adopt regulations that were **consistent with** the **minimum requirements** issued by the Board, nothing prevented the DOJ from imposing greater burdens on entities covered by the

regulations. *Id.* at 587. Because the court concluded that the DOJ "never authoritatively adopted a position contrary to" that set forth in the 1994 TAM, it deferred to the DOJ's position and held that the athletic arena was required to provide wheelchair-bound spectators with lines of sight over standing spectators.

The court in *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262 (D. Minn. 1997), adopted wholesale the reasoning and holding of the D.C. Circuit in *Paralyzed Veterans.*

In contrast to *Paralyzed Veterans* and *Ellerbe Becket* stand *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730 (3d Cir. 1999) and *Independent Living Resources v. Oregon Arena Corp.*, 982 F. Supp. 698 (D. Ore. 1997).

In *Caruso,* a wheelchair-bound patron sued a music and entertainment facility because their wheelchair spaces had no lines of sight over standing spectators. 193 F.3d at 731. The Third Circuit held that the DOJ "implicitly adopted" the Board's commentary regarding § 4.33.3 and therefore its current position represents a change from its intent at the time of § 4.33.3's promulgation, rendering its current position on § 4.33.3 unworthy of deference. *Id.* at 736-37 (citing *Thomas Jefferson University,* 512 U.S. at 512 ("[W]e must defer to the Secretary's interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's

promulgation.")). The court attributed the Board's commentary to the DOJ for a number of reasons: (1) The DOJ referred all comments on the proposed rules to the Board; (2) the DOJ relied on the Board to make adequate changes based on those comments; (3) the Board specifically changed the language of § 4.33.3 in response to comments and explained that change in its commentary; (4) the DOJ was a "member of the Board" and "participated actively . . . in preparation of both the proposed and final versions of the [guidelines]"; and (5) the DOJ's commentary upon the issuance of the Board's final guidelines that the Board adequately addressed all comments. *Caruso,* 193 F.3d at 736. In holding that it could not defer to the DOJ's current position on § 4.33.3, the Third Circuit agreed with the D.C. Circuit's observation in *Paralyzed Veterans* that "the issue is not easy," but nevertheless "respectfully disagree[d]" with the D.C. Circuit's contrary conclusion.

The Court in *Independent Living* reached the same conclusion as did the court in *Caruso,* employing similar reasoning. In *Independent Living,* a disabled person brought an action against the owner and operator of a sports arena. 982 F. Supp. at 706. At issue was whether the court should defer to the DOJ's current position on § 4.33.3. The court acknowledged that the DOJ's current position was a reasonable one. *Id.* at 734. However, it found that the DOJ's current position represented an impermissible change from its previous position, as represented by the Board's commentary regarding § 4.33.3. The court attributed

the Board's commentary to the DOJ for a number of reasons:

First, the DOJ did not make its "comments" as part of the notice-and-comment procedure; rather, it relied on the Board to fulfill this role, and it found these comments "adequate" in the general statement it made at the time of the promulgation of § 4.33.3. *Id.* at 740-41 ("If the Access Board's response to public comments regarding individual Guidelines was not implicitly incorporated by DOJ, then the agency did not respond to those comments. . . .").

Second, the DOJ referred any comments regarding the proposed regulations to the Board. If the Board's commentary was not binding on the DOJ, then the notice-and-comment procedure would be "an empty gesture." *Id.* at 741; *see Paulsen v. Daniels,* 413 F.3d 999, 1008 (9th Cir. 2005) ("Ordinarily when a regulation is not promulgated in compliance with the APA, the regulation is invalid.").

Third, the DOJ adopted the Access Board's commentary by virtue of its general statement that the comments from the public were "addressed adequately in the final ADAAG" and by the "numerous changes" that the Access Board had made in response to those comments. *Independent Living,* 982 F. Supp. at 741.

Finally, the court was persuaded by the unique, close relationship between the Board, which was required to establish the minimum standards for the ADA regulations, and the DOJ, which was required to

promulgate ADA regulations that were consistent with those minimum standards. *Id.* The court found this relationship all the more persuasive in light of the DOJ's admission that the two agencies worked closely together in drafting those guidelines. Therefore, the Court held that the DOJ's position was not entitled to deference.

All four of these cases agree on at least one issue: In order for the DOJ's position to be entitled to deference, the DOJ must not have previously held the position espoused by the Board in its commentary. In other words, these courts agree that if the Board's commentary is imputed upon or attributed to the DOJ, then the DOJ's current position is not entitled to deference. Despite arguments to the contrary by the DOJ,[3] the Court concludes that this inquiry is dispositive as well.

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[3] The DOJ argues that both the Board's commentary at the time of the notice of the proposed guidelines and at the time of the final guidelines leave open the possibility that the Board did not interpret § 4.33.3 as not addressing the issue of lines of sight over standing spectators. Amicus Brief at 16-19. At the time of the proposed guidelines, the Board's reference to "full lines of sight" could be viewed as its consideration of what technical or qualitative specifications should govern the requirement of lines of sight over standing spectators, not **whether** lines of sight over standing spectators must be provided. *Id.* Likewise, the Board's commentary at the time of the final guidelines could be viewed as its contemplation of the development in the future of detailed guidelines that contemplate further technical or qualitative refinements. *Id.* The Court is not persuaded by this argument. The Board, at the time of the final guidelines, after noting that

(Continued on following page)

The Court agrees wholeheartedly with both the Third and D.C. Circuits that this is a difficult issue. If the DOJ explicitly adopted the Board's commentary, it would be easy. However, the DOJ did not explicitly adopt the Board commentary, and the Court is instead left with the tortured history of the promulgation of § 4.33.3 set forth above. In the end, the Court believes that the Third Circuit's approach in *Caruso* represents the most principled analysis of the present issue. For that reason, the Court adopts the reasoning and conclusion set forth therein.

In this Court's view, the most important factor in reaching the conclusion that the Board's commentary must be imputed to the DOJ is the DOJ's comment regarding the Board's actions during the notice-and-comment period. The DOJ emphasized that the public was put on notice of the DOJ's intent to adopt the guidelines proposed by the Board, with any changes made by the Board. *See* 56 Fed. Reg. 35585. The DOJ noted its own "active participation" in the public hearings on the proposed guidelines and "in

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"many commenters . . . recommended that lines of sight . . . be provided over standing spectators," stated only that "[t]he issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities." 56 Fed. Reg. 35440. Had the Board in any way indicated that it intended to **further** address, or to **more thoroughly address** the issue, the Court might be inclined to give this argument some weight. The Board did not. Nor is the Court convinced that the Board's current position (as set forth in its 1998 Technical Assistance Manual), which is in accord with the DOJ's current position, accurately portrays its original interpretation of § 4.33.3.

preparation of both the proposed and final versions of" the guidelines. *Id.* Further, it noted that the Board had adequately addressed all comments made by the public. *Id.* Finally, the DOJ noted the Board's "numerous changes" that were made in arriving at the final guidelines. *Id.* In this Court's view, this statement amounts to a broad approval of the Board's actions, including the Board's commentary during the rulemaking process. In light of the DOJ's public affirmation of the Board's commentary at the time it promulgated § 4.33.3, and in the absence of any public expressions of contrary intent, the Board's commentary is fairly attributed to the DOJ. Having adopted this commentary as its own, the DOJ was not free to change its interpretation in 1994 without first going through the notice-and-comment process, which it concedes it did not.

The Court does not mean to suggest that a rule that sports stadiums and other venues where spectators are expected to stand during all or part of a performance must provide to wheelchair-bound patrons lines of sight over standing spectators is not desirable. Indeed, even the *Caruso* court, whose reasoning upon which defendant relies, acknowledged that such a rule "has much to recommend," a sentiment with which this Court certainly agrees. *Caruso*, 193 F.3d at 737. Were the Court to write on a clean slate, the Court would be tempted to hold that § 4.33.3 requires lines of sight over standing spectators. After all, a law requiring that individuals with disabilities be able to attend exciting sporting events

has little meaningful effect if those individuals are deprived of viewing, in the words of the plaintiff here, the parts they "want to see the most." Indeed, such a rule would definitely be in keeping with the purpose of Title III of the ADA, which is to provide individuals with disabilities with access to "the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a).

One argument raised at the hearing on this matter by defense counsel cannot pass without comment. Defense counsel's efforts to conflate the position of a wheelchair-bound quadriplegic with, to use counsel's phrase, a "height-disadvantaged" person such as herself, is not persuasive. Counsel's argument focuses solely on the height differential between individuals who use wheelchairs for mobility and ambulatory individuals; however, "height-disadvantaged" ambulatory individuals have options that are not available to those who must use wheelchairs. *Cf. Independent Living,* 982 F.Supp. at 733 ("[A]mbulatory patrons can move around or angle their bodies to obtain a better view, or stand on their chairs. Small children may be held aloft by their parents. . . . While some ambulatory spectators occasionally have an obstructed view, that experience is the rule, rather than the exception, for those who attend Rose Garden events in a wheelchair. It is no answer to say that some ambulatory spectators may also have obstructed sightlines."). Moreover, the height differential which counsel references is not nearly as pronounced as that

experienced by a person who must sit in a place where other adults – short and tall alike – may stand to their full height or may maneuver their bodies to gain maximum visual access. *Compare id.* (noting testimony from a senior project architect that indicated that the average wheelchair-bound spectator's view is that of a person who is 42 inches (or three feet, six inches tall)) *with* Center for Disease Control 2000 Growth Charts: United States, available at <<http://www.cdc.gov/nchs/data/nhanes/growthcharts/set3/all.pdf>> (noting that the median (50th percentile) height for a five-year-old child in the United States is 42 inches).

Although the Court does not find this particular argument by counsel to be persuasive, the Court is constrained by the DOJ's ***original*** interpretation of § 4.33.33; that is, the original position of the Board that § 4.33.3 simply does not address the question of lines of sight over standing spectators. In light of this position, the Court's ruling must be in favor of the defendant.

E. Ruling on ADA Claim

Having concluded that § 4.33.3 must be interpreted as not addressing the issue of lines of sight over standing spectators, the Court **DENIES** plaintiff's Motion for Summary Judgment on the ADA claim and **GRANTS** defendant's Motion for Summary Judgment as to the ADA claim.

VI. State Law Claims

As plaintiff's counsel has conceded in a previous proceeding, plaintiff's state-law claims are dependent upon a finding of an ADA violation. *See* July 29, 2005, Transcript at 19 (attached to Motion as Ex. D) ("The state[-]law claims are predicated on the violation of the federal claims. So if we lose the federal claim, we lose the state[-]law claim."). Having found no such violation as a matter of law, the Court **DENIES** plaintiff's Motion for Summary Judgment as to the state-law claims and **GRANTS** defendant's Motion for Summary Judgment as to the state-law claims.

VII. Conclusion

As set forth above, the Court **DENIES** plaintiff's Motion for Summary and **GRANTS** defendant's Motion for Summary Judgment. Summary Judgment is granted in favor of defendant as to all claims.

The Clerk shall close the case.

IT IS SO ORDERED.

DATE: 9-8-06.

/s/ S Larson
STEPHEN G. LARSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT MILLER, Plaintiff v. THE CALIFORNIA SPEEDWAY CORPORATION, Defendant.	Case No. EDCV 01-00434 SGL JUDGMENT (Filed Sep. 18, 2006)

In light of the Court's Order of September 8, 2006, granting summary judgment on all claims in favor of defendant, the Court enters **JUDGMENT** in favor of defendant as to all claims.

IT IS SO ORDERED.

DATE: 9-18-06

/s/ S Larson
STEPHEN G. LARSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT MILLER, Plaintiff-Appellant, v. THE CALIFORNIA SPEEDWAY CORPORATION, Defendant-Appellee.	No. 06-56468 D.C. No. CV-01-00434-SGL Central District of California, Riverside ORDER (Filed Sep. 16, 2008)

Before: CANBY and BYBEE, Circuit Judges, and HUNT,* District Judge.

Judge Bybee voted to deny the petition for rehearing en banc, and Judges Canby and Hunt recommended denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. Appellee's petition for rehearing en banc, filed August 22, 2008, is DENIED.

* The Honorable Roger L. Hunt, United States District Court, District of Nevada, sitting by designation.

5 U.S.C. § 553. Rule Making

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * *

5 U.S.C. § 551. Definitions

* * *

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

42 U.S.C. § 12181. Definitions

As used in this *title* [*42 USCS §§ 12181* et seq.]:

(1) Commerce. The term "commerce" means travel, trade, traffic, commerce, transportation, or communication –

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) Commercial facilities. The term "commercial facilities" means facilities –

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include railroad locomotives, railroad freight cars, railroad cabooses, railroad cars described in section 242 [*42 USCS § 12162*] or covered under this *title* [*42 USCS §§ 12181* et seq.], railroad rights-of-way, or facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (*42 U.S.C. 3601* et seq.).

(3) Demand responsive system. The term "demand responsive system" means any system of providing transportation of individuals by a vehicle, other than a system which is a fixed route system.

(4) Fixed route system. The term "fixed route system" means a system of providing transportation of individuals (other than by aircraft) on which a vehicle is operated along a prescribed route according to a fixed schedule.

(5) Over-the-road bus. The term "over-the-road bus" means a bus characterized by an elevated passenger deck located over a baggage compartment.

(6) Private entity. The term "private entity" means any entity other than a public entity (as defined in section 201(1) [*42 USCS § 12131(I)*].

(7) Public accommodation. The following private entities are considered public accommodations for purposes of this *title* [*42 USCS §§ 12181* et seq.], if the operations of such entities affect commerce --

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

(8) Rail and railroad. The terms "rail" and "railroad" have the meaning given the term "railroad" in section 202(e) of the Federal Railroad Safety Act of 1970 (*45 U.S.C. 431(e)*) [*49 USCS § 20102(1)*].

(9) Readily achievable. The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include –

(A) the nature and cost of the action needed under this Act;

(B) the overall financial resources of the facility or facilities involved in the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

(10) Specified public transportation. The term "specified public transportation" means transportation by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(11) Vehicle. The term "vehicle" does not include a rail passenger car, railroad locomotive, railroad freight car, railroad caboose, or a railroad car described in section 242 [*42 USCS § 12162*] or covered under this *title* [*42 USCS §§ 12181* et seq.].

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42 U.S.C. § 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term. Except as provided in subsection (b), as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) [*42 USCS § 12182(a)*] includes –

(1) a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act [enacted July 26, 1990] that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this *title* [*42 USCS §§ 12181* et seq.]; and

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42 U.S.C. § 12186. Regulations

* * *

(b) Other provisions. Not later than 1 year after the date of the enactment of this Act [enacted July 26,

1990], the Attorney General shall issue regulations in an accessible format to carry out the provisions of this *title* [*42 USCS §§ 12181* et seq.] not referred to in subsection (a) that include standards applicable to facilities and vehicles covered under section 302 [*42 USCS § 12182*].

(c) Consistency with ATBCB guidelines. Standards included in regulations issued under subsections (a) and (b) shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504 of this Act [*42 USCS § 12204*].

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42 U.S.C. § 12206. Technical assistance [Caution: See prospective amendment note below.]

* * *

(c) Implementation.

* * *

(3) Technical assistance manuals. Each Federal agency that has responsibility under paragraph (2) for implementing this Act shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this Act no later than six months after

applicable final regulations are published under titles I, II, III, and IV.

* * *

28 C.F.R. Ch. 1, App. A

* * *

4.33.3* Placement of Wheelchair Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be *provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. *At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.*

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28 C.F.R. § 36.406 Standards for new construction and alterations.

(a) New construction and alterations subject to this part shall comply with the standards for accessible design published as appendix A to this part (ADAAG).

(b) The chart in the appendix to this section provides guidance to the user in reading appendix A to this part (ADAAG) together with subparts A

through D of this part, when determining requirements for a particular facility.

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56 Fed. Reg. 35,440

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Comment. The NPRM asked questions regarding row spacing and lines of sight over standing spectators in sports arenas and other similar assembly areas. Many of the persons who responded to the question stated that they have difficulty accessing mid-row seats in an assembly area. Many commenters also recommended that lines of sight should be provided over standing spectators.

Response. Building and life safety codes set minimum distances between rows of fixed seats with consideration of the number of seats in a row, the exit aisle width and arrangement, and the location of exit doors. Because row spacing is related to these other factors, the Board does not believe that it is appropriate for the guidelines to set requirements in this area. However, information has been included in the appendix at A4.33.3 on "continental" seating which allows a greater number of seats per row with a commensurate increase in row spacing and exit doors. This alternative increases ease of access to mid-row seats for people who walk with difficulty and facilitates emergency egress for all people. Builders and designers are encouraged to consider "continental" seating along with other factors when planning seating in assembly areas.

The issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities.

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56 Fed. Reg. 35,514

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4.33.3* Placement of Wheelchair Locations. Wheelchair areas shall be an integral part of any fixed seating plan and shall be *provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.* They shall adjoin an accessible route that also serves as a means of egress in case of emergency. *At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users.*

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56 Fed. Reg. 35,586

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All these comments were considered in the same manner as other comments on the Department's proposed rule and, in the Department's view, have been addressed adequately in the final ADAAG.

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57 Fed. Reg. 60,612

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1191

[Docket No. 92-2]

RIN 3014 AA12

Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; State and Local Government Facilities

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Architectural and Transportation Barriers Compliance Board is issuing proposed guidelines to provide additional guidance to the Department of Justice in establishing accessibility standards for new construction and alterations of State and local government facilities covered by title II of the Americans with Disabilities Act (ADA) of 1990. The guidelines will ensure that newly constructed and altered State and local government facilities are readily accessible to and usable by individuals with disabilities in terms of architecture and design, and communication. The standards established by the Department of Justice must be consistent with and may incorporate the guidelines.

DATES: Comments should be received by March 22, 1993. Comments received after this date will be

considered to the extent practicable. Where possible, the comments should reference specific sections in the proposed guidelines. The Board will hold public hearings on the proposed guidelines on the dates and times listed under **SUPPLEMENTARY INFORMATION** below.

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57 Fed. Reg. 60,618

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Assembly Areas

During the initial rulemaking, the Board requested information on lines of sight at seating locations for persons who use wheelchairs. See 56 FR 2296 (January 22, 1991). The Board received a number of comments which recommended that ADAAG 4.33 (Assembly Areas) be expanded to address other issues such as companion seating, integration and dispersal, and transfer seating. An overwhelming majority of responses favored including a provision requiring lines of sight over standing spectators in sports arenas and other similar assembly areas. A few commenters opposed such a provision because it would be either unenforceable, add significant cost or reduce seating capacity. Some commenters felt that an entry level or front row seating location was acceptable if companion seating was available for more than one person.

After careful review of comments and of State accessibility codes and standards, the Board modified the scoping provisions in the final ADAAG for wheelchair seating, added requirements for transfer seats and companion seating, and clarified the dispersal requirement. See 56 FR 35408 (July 26, 1991). Additionally, the Board felt it was essential to conduct further research on assembly areas with respect to other recommendations received in response to the rulemaking. The Board is currently sponsoring a research project on accessibility in assembly areas which will provide additional information for future revisions of ADAAG. The Board intends to address the issue of lines of sight over standing spectators in the guidelines for recreational facilities which will be proposed at a future date.

Question 17: The Board is seeking comments on the design issues associated with providing integrated and dispersed accessible seating locations with a clear line of sight over standing spectators in arenas, stadiums or other sports facilities. Clearly, not all seats in sports facilities afford clear lines of sight over standing spectators. Tall persons, guard railings or other fixed elements in the facility may block one's view of the playing field. However, since persons with disabilities have fewer choices of seating locations, should all the accessible seating locations be required to have lines of sight over standing spectators? Would such a requirement compromise the requirement for dispersed wheelchair seating by providing seating in fewer locations? If maximum dispersal of accessible

seating locations is provided, what percentage of such locations can be provided with a clear line of sight over standing spectators? The Board encourages commenters to provide cost information and examples (including drawings, pictures or slides) of sports facilities where the accessible seating locations are dispersed, integrated and provide clear lines of sight over standing spectators. Additionally, the Board is seeking comments on how the dispersal requirement is achieved in arenas or stadiums where fixed seating is on different levels within a tier having steps. How should dispersal be defined in such facilities? If the same definition of dispersal cannot be applied to all types of facilities, is there a way to categorize different facilities and apply a specific dispersal requirement to each category? What are the design issues associated with providing accessible seating locations within one tier on different levels?

* * *

64 Fed. Reg. 62,248

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

36 CFR Part 1190 and 1191

[Docket No. 99-1]

RIN 3014-AA20

Americans With Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) is proposing to revise and update its accessibility guidelines for buildings and facilities covered by the Americans with Disabilities Act of 1990 (ADA) and the Architectural Barriers Act of 1968 (ABA). These guidelines cover new construction and alterations and serve as the basis for enforceable standards issued by other Federal agencies. As a result of this revision and update, the guidelines for the ADA and ABA are consolidated in one Code of Federal Regulations part. The guidelines for the ABA also cover buildings and facilities leased by Federal agencies. The Department of Justice and the Department of Transportation are responsible for issuing standards based on the Access

Board's guidelines under the ADA. ABA standards are issued by the Department of Defense, General Services Administration, the Department of Housing and Urban Development, and the U.S. Postal Service.

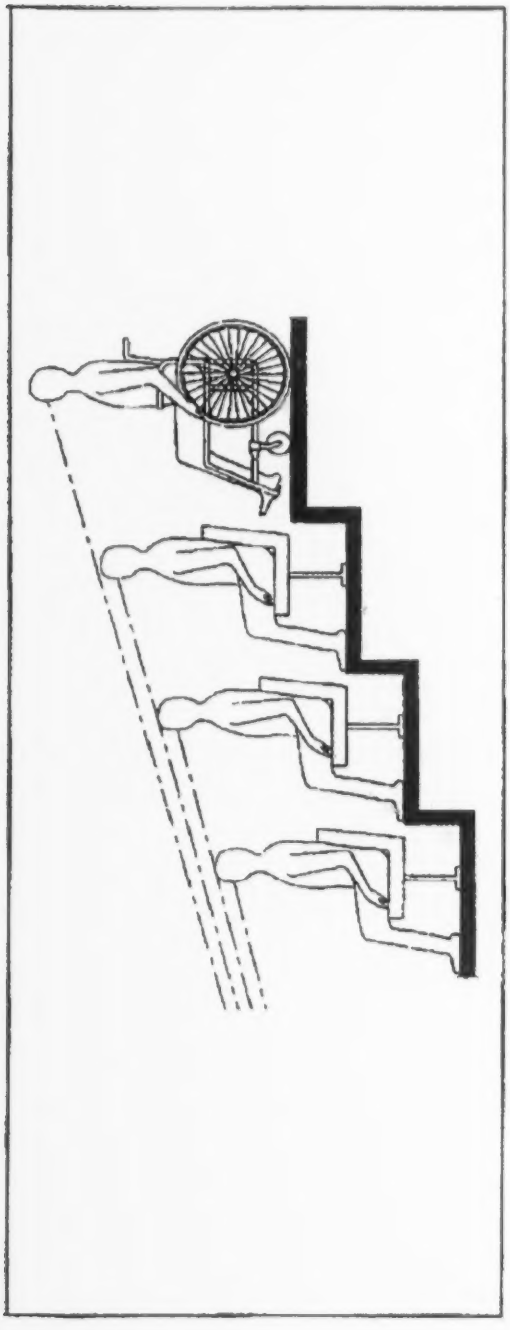
---

64 Fed. Reg. 62,501-62,502

802.9 Lines of Sight. Spectators seated in *wheelchairs* shall be provided lines of sight comparable to those provided to other spectators.

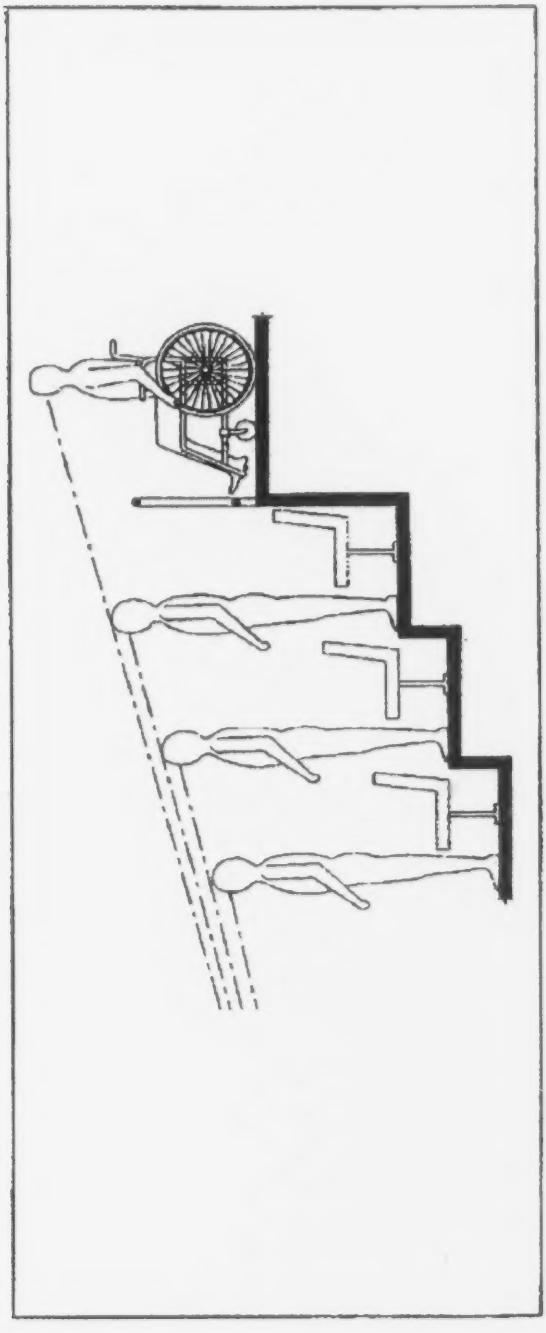
> **802.9.1 Comparable Lines of Sight for Seated Spectators.** Where spectators are expected to remain seated during events, spectators seated in *wheelchairs* shall be provided with lines of sight to the performance area or playing field comparable to that provided to spectators in the seating area in closest proximity to the location of the *wheelchair spaces*, but not in the same row.

Figure 802.9.1



802.9.2 Comparable Lines of Sight Over Standing Spectators. Where people will be expected to stand at their seats during events, *wheelchair spaces* shall be located so that they will provide people seated in *wheelchairs* with lines of sight of the performance area or playing surface over standing spectators comparable to that provided to standing spectators in the seating area in closest proximity to the *wheelchair spaces*, but not in the same row.

Figure 802.9.2



69 Fed. Reg. 44,392-44,393

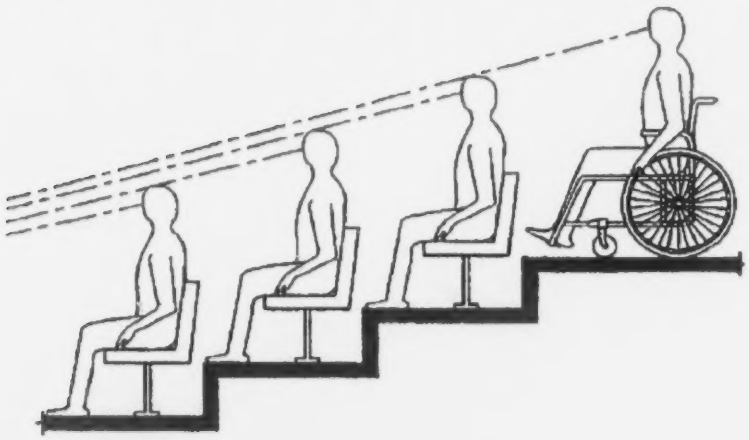


Figure 802.2.1.1
Lines of Sight Over the
Heads of Seated Spectators

802.2.1.2 Lines of Sight Between Heads. Where spectators are provided lines of sight over the shoulders and between the heads of spectators seated in the first row in front of their seats, spectators seated in *wheelchair spaces* shall be afforded lines of sight over the shoulders and between the heads of seated spectators in the first row in front of *wheelchair spaces*.

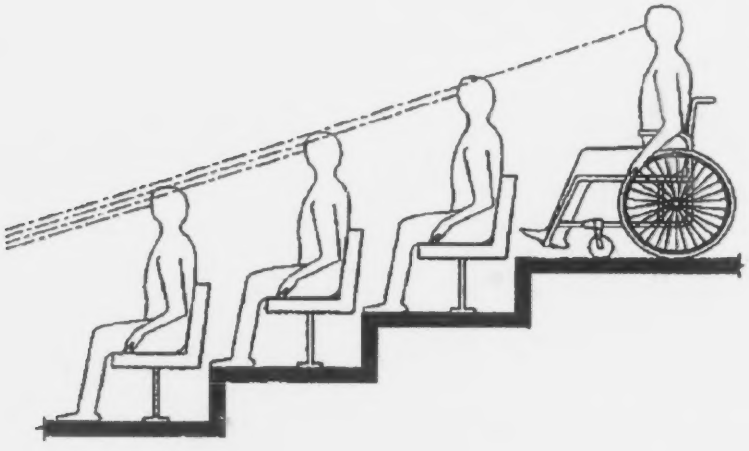


Figure 802.2.1.2
Lines of Sight Between the Heads of Seated Spectators

802.2.2 Lines of Sight Over Standing Spectators. Where spectators are expected to stand during events, spectators in *wheelchair spaces* shall be afforded lines of sight complying with 802.2.2.

802.2.2.1 Lines of Sight Over Heads. Where standing spectators are provided lines of sight over the heads of spectators standing in the first row in front of their seats, spectators seated in *wheelchair spaces* shall be afforded lines of sight over the heads of standing spectators in the first row in front of *wheelchair spaces.*

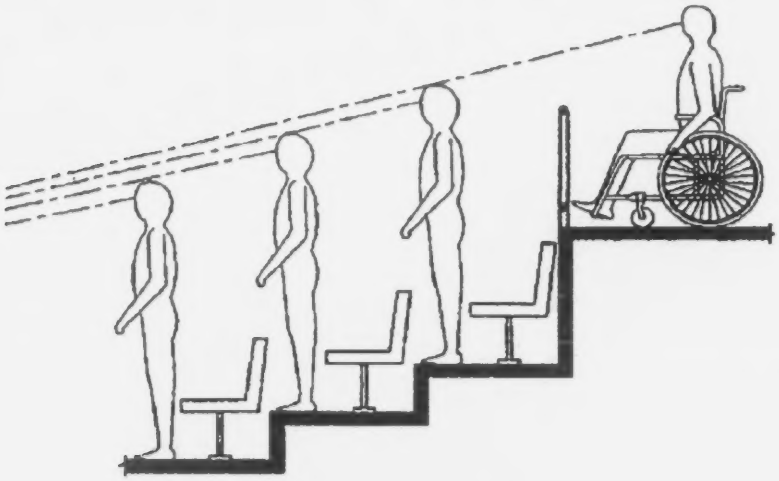


Figure 802.2.2.1
Lines of Sight Over the Heads of Standing Spectators

802.2.2.2 Lines of Sight Between Heads. Where standing spectators are provided lines of sight over the shoulders and between the heads of spectators standing in the first row in front of their seats, spectators seated in *wheelchair spaces* shall be afforded lines of sight over the shoulders and between the heads of standing spectators in the first row in front of *wheelchair spaces.*

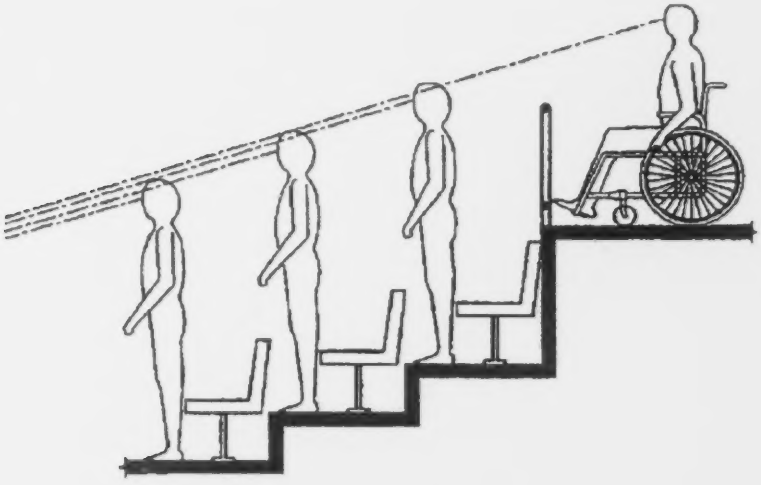


Figure 802.2.2.2
Lines of Sight Between the Heads of Standing Spectators

73 Fed. Reg. 34,508-34,509

DEPARTMENT OF JUSTICE

28 CFR Part 36

[CRT Docket No. 106; AG Order No. 2968-2008]

RIN 1190-AA44

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities

AGENCY: Department of Justice, Civil Rights Division.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is issuing this notice of proposed rulemaking (NPRM) in order to: Adopt enforceable accessibility standards under the Americans with Disabilities Act of 1990 (ADA) that are "consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board" (Access Board); and perform periodic reviews of any rule judged to have a significant economic impact on a substantial number of small entities, and a regulatory assessment of the costs and benefits of any significant regulatory action as required by the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

In this NPRM, the Department proposes to adopt Parts I and III of the *Americans With Disabilities Act and Architectural Barriers Act Accessibility Guidelines* (2004 ADAAG), which were published by the Architectural and Transportation Barriers and Compliance Board (Access Board) on July 23, 2004. Prior to its adoption by the Department, the 2004 ADAAG is effective only as guidance to the Department; it has no legal effect on the public until the Department issues a final rule adopting the revised ADA Standards (proposed standards).

Concurrently with the publication of this NPRM, the Department is publishing an NPRM to amend its title II regulation, which covers state and local government entities, in order to adopt the 2004 ADAAG as its proposed standards for title II entities, to make amendments to the title II regulation for consistency with title III, and to make amendments that reflect the collective experience of 16 years of enforcement of the ADA.

Americans with Disabilities Act

Title III Technical Assistance Manual 1994 Supplement

* * *

III-7.5180 Assembly areas.

[Insert the following text before the sentence beginning, "Finally, wheelchair seating. . . ." p. 64.]

> In addition to requiring companion seating and dispersion of wheelchair locations, ADAAG requires that wheelchair locations provide people with disabilities lines of sight comparable to those for members of the general public. Thus, in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand. This can be accomplished in many ways, including placing wheelchair locations at the front of a seating section, or by providing sufficient additional elevation for wheelchair locations placed at the rear of seating sections to allow those spectators to see over the spectators who stand in front of them.

* * *

08-782

Supreme Court, U.S
FILED
JAN 14 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

THE CALIFORNIA SPEEDWAY CORPORATION,

Petitioner,

v.

ROBERT MILLER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Respondent, Robert Miller, objects to the "Question Presented" found in the Petition for Writ of Certiorari as it unfairly presents the question. California Speedway presents the question as, "Must a court afford deference to a government agency's interpretation of ambiguous regulatory language, where the proffered interpretation covers a subject matter ***that the agency*** intentionally ***excluded from the scope of its notice and comment rule-making***?" As discussed below, the "subject matter" was expressly covered in the notice and comment period and it was an advisory board, not the "agency," that authored ambiguous comments about the potential scope of the regulations. Thus, a proper "Question Presented" would read:

Should a court afford deference to a government agency's interpretation of regulatory language, where: (1) the proffered interpretation is entirely consistent with the regulation; (2) the agency has never given a conflicting or different interpretation; but (3) an advisory board – not the agency – made some off-hand comments about the potential scope of the proposed regulations, which comments are not binding on the agency and were never adopted by the agency?

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STATEMENT OF THE CASE

Respondent, Robert Miller, is a 58 year-old quadriplegic who must use an electric wheelchair for mobility. He lives in Highland, California, about 20 minutes from the California Speedway located in Fontana, California. He is an avid fan of NASCAR and has gone to the California Speedway three times a year, every year from the inaugural race in 1997 to 2003 and six times a year from 2004 to the present. Mr. Miller filed suit against the California Speedway because of his great frustration over the wheelchair-seating situation. Mr. Miller misses the best parts of every race. When the spectators in the row directly in front of him (directly in front of the wheelchair seating area) stand up, they completely block his view of the race. This happens all the time because spectators stand during all the key and exciting moments of the race. He cannot even see the track over the standing spectators.

Mr. Miller filed suit under Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12181, *et seq.* (Pet. App. 3). The district court granted California Speedway's motion for summary judgment on the basis that the ADA did not require line of sight over standing spectators. (Pet. App. 3). The Ninth Circuit reversed the judgment, concluding that the implementing regulations, found in the Code of Federal Regulations, required the California Speedway to provide line of sight over standing spectators. (Pet. App. 3).

The Ninth Circuit's decision noted that it was uncontested (and uncontestable) by any party that the regulation at issue was a reasonable interpretation of the ADA and "would clearly pass muster if challenged under the ADA." (Pet. App. 12). Instead, the challenge was to the Department of Justice's ("DOJ") formal interpretation of the regulation found in the 1994 supplement to its Technical Assistance Manual ("TAM"). The Ninth Circuit joined with the D.C. Circuit in deciding that the DOJ's interpretation was consistent with the regulation and entitled to substantial deference.

REASONS FOR DENYING THE WRIT

While it is true that the Third Circuit has reached a different conclusion than the Ninth and D.C. Circuits about how much deference to grant the DOJ's interpretation of "line of sight" in stadium design, the issue is of limited importance and limited scope; it does not warrant review by this Court. First, the DOJ is publishing new regulations this year which will end all future controversies for new construction. Thus, only stadiums built between 1992 and 2009 would be covered by the original regulation. Second, because the subject matter at issue is, essentially, the interpretation of a building code, there is less concern about "inconsistent" standards. Stadiums do not travel. They will not cross Circuit lines. Finally, the disagreements between the Circuits are not about legal standards or statements of the law

but about the application of agreed-upon legal principles. This is simply not an "extraordinary case of peculiar gravity and general importance" (36 C.J.S. Federal Courts § 291) that would warrant Supreme Court review.

I. THE "UNIFORM" RULE DEMANDED BY THE PETITIONER WILL BE IMPLEMENTED THIS YEAR

In urging this Court to grant the petition for writ of certiorari, the California Speedway argues that, "a uniform rule is warranted and urgently needed." (Pet. 9). First, it should be noted that the regulation at issue in this case, and the DOJ's formal interpretation of that regulation, has been published and available since 1994. 28 C.F.R., Part 36, App. A, § 4.33.3, as interpreted by TAM § III-7.5180 (1994 Supp.). Any contractor, architect, or stadium designer considering the requirements of the ADA has to simply review the Americans with Disabilities Act Accessibility Guidelines and the Technical Assistance Manual to understand what is required. Only someone who fails to consult the published material would run afoul of the clearly stated standard.

Additionally, in November of 1999, the Access Board proposed amendments to its guidelines to explicitly address the standing spectator problem. 64 Fed. Reg. 62,248, 62,501-02 (1999). These were adopted in July 2004. 69 Fed. Reg. 44,083 (2004). Guideline 802.2 now distinguishes between "lines of

sight over seated spectators" and "lines of sight over standing spectators." 69 Fed. Reg. at 44,391-33. On June 17, 2008, it published proposed regulations that would amend the DOJ's ADA regulations. *See* 73 Fed. Reg. 34,508 (2008). On August 18, 2008, the Notice of Proposed Rule Making (NPRM) comment period ended.[1] Final action is slated for January of 2009.[2] Thus, from 2009 onward, the requirement for line of sight over standing spectators will be found in the regulations themselves, rather than in the TAM. Thus, there is no need for Supreme Court review to provide the "uniform rule" demanded in the petition for writ. An opinion by this Court simply will not have the widespread application anticipated by the petitioner.

II. THE SPLIT BETWEEN THE THIRD CIRCUIT AND THE OTHER CIRCUITS IS OF LIMITED CONCERN

There are numerous cases where inconsistent federal standards can create significant problems. Laws that govern behavior or expression are especially troublesome. Those concerns are not implicated in this case. Although the statute involved is a civil rights statute, the regulation implicated in this case is, essentially, a building code. Because the vast majority of building codes are found in State regulations, it is

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[1] http://www.reginfo.gov/public/do/eoReviewSearch

[2] http://www.reginfo.gov/public/do/eoReviewSearch

already a fact of life that building codes change from one Circuit to the next. Because stadiums do not travel and do not cross Circuit lines, the fact that a stadium being built somewhere in the Third Circuit may have a different code to meet than a building being built in the Ninth/D.C. Circuits does not implicate the type of concern that justifies Supreme Court review. The matter must be "special and important" and not involve merely academic or episodic problems. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 616 (1955) (construing an earlier version of U.S.Sup.Ct. Rule 10).

III. THE PETITION SHOULD BE DENIED BECAUSE CHALLENGED ERROR IS ONE OF APPLICATION

The petition should be denied because the asserted error consists of a misapplication of a properly stated rule of law. In this case, the Circuits do not disagree with each other about the appropriate legal principles. Instead, the disagreement is merely one of application and, therefore, should not be the subject of Supreme Court review. "A petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." U.S.Sup.Ct. Rule 10.

As the Ninth Circuit noted, no party in this case and no previously published decision has contested the validity of the regulation itself. (Pet. App. 12). That regulation, section 4.33.3 of the Americans with

Disabilities Act Accessibility Guidelines ("ADAAG") is titled "Placement of Wheelchair Locations" and reads, in pertinent part: "*Wheelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public.*" In November of 1994, the Department of Justice issued a formal interpretation of that section, printed in the Technical Assistance Manual, that reads: "*in assembly areas where spectators can be expected to stand during the event or show being viewed, the wheelchair locations must provide lines of sight over spectators who stand. . . .*" The Ninth Circuit held that:

> The DOJ's 1994 interpretation is consistent with the statutory requirement that the facilities be "readily accessible to" and "usable by" persons with disabilities. 42 U.S.C. § 12183(a)(1). To meaningfully use the Speedway facilities, a wheelchair patron needs to be able to see the event in the circumstances in which the race typically takes place, with a standing audience. Otherwise the Speedway race track is not "usable" as a practical matter. Because the DOJ's interpretation is a reasonable, practical construction in light of the ambiguity of the regulation, it is entitled to substantial deference.

(Pet. App. 17-18). On this point, the Circuits agree. If an agency interpretation is entirely consistent with

the regulations, it is entitled to substantial deference. *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

In the present case, the Third Circuit does not disagree that the DOJ's interpretation is a reasonable reading. *See Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 733 (3rd Cir. 1999). ("both readings of the rule are plausible and consistent with the ADA's purpose of enabling people with disabilities to share equally in the benefits. . . ."). Moreover, both Ninth Circuit and Third Circuit are in agreement that an agency is not free to simply change a legislative rule without going through the notice and comment procedures of the Administrative Procedures Act. *See Blockbuster*, 193 F.3d at 737 and *Miller v. California Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008). The disagreement between the Circuits is two-fold and both are disagreements in application, *i.e.*, whether the commentary by the Access Board is imputed to the DOJ and whether the comments are interpretive or legislative.

First, the Circuits disagree over whether the comments by the Access Board should be imputed to the DOJ. The Third Circuit thought they should: "we respectfully disagree with the District of Columbia Circuit's conclusion that the DOJ did not adopt what the Access Board had said. Instead, we conclude that the DOJ implicitly adopted the Access Board's analysis of 4.33.3." *Blockbuster,* 193 F.3d at 736. The Ninth Circuit reached a different conclusion: "When the

DOJ adopted the Access Board's guidelines as its own standards, it literally adopted the *guidelines* . . . It did not adopt any other Access Board commentary, notices of proposed rulemaking, or internal memoranda. Whatever the *Access Board* thought of its own guidelines, the *Department of Justice* adopted the text of the guidelines themselves, not the Access Board's interpretation of that text." *Miller*, 536 F.3d 1020 at 1031-1032. Thus, the disagreement is one of application. The Circuits simply reached different conclusions about a fact, *i.e.*, whether the DOJ adopted the Access Board's commentary along with the regulations.

Second, the Circuits disagree over whether the Access Board's commentary is legislative or interpretive. The Third Circuit felt that the commentary was legislative and held, "An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning." *Blockbuster*, 193 F.3d at 737 (citations omitted). The Ninth Circuit disagreed:

> We think that, even if the DOJ's interpretation constituted a change in the understanding of its original regulations, the DOJ was not required to proceed by notice and comment because both the Access Board's original position (as imputed to the DOJ) and the TAM would ***constitute interpretive rules***. *See* 5 U.S.C. § 553(b)(3)(A); *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir.2004) (holding that an agency can modify an interpretive

> rule without notice and comment). An interpretive rule is one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995) (quotation marks and citation omitted). "[I]nterpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule," whereas legislative rules "create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir.2003).

Miller, 536 F.3d at 1033 (emphasis added).

Thus, the disagreements between the Circuits are one of application, not of legal principles. As such, this is not a case which warrants Supreme Court review.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the petition for writ of certiorari be denied in its entirety.

January 14, 2009

Respectfully submitted,

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Supreme Court, U.S.
MOTION FILED
JAN 16 2009
William K. Suter,
Clerk

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No. 08-782

IN THE

Supreme Court of the United States

THE CALIFORNIA SPEEDWAY CORPORATION,

Petitioner,

v.

ROBERT MILLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF SPEEDWAY SONOMA, LLC FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to U.S. Sup. Ct. R. 37.2(b), Speedway Sonoma, LLC ("Speedway Sonoma"), respectfully requests leave to file a brief as *amicus curiae* in support of petitioner, the California Speedway Corporation. A copy of the proposed brief is attached.

As more fully set forth in the brief, Speedway Sonoma is a Delaware limited liability company, which operates Infineon Raceway, a professional racetrack in Sonoma, California, the sixth-largest market for motorsports in the United States. The racetrack opened in 1968 and, since 1996 when Speedway Sonoma acquired it, has undergone substantial renovations costing in excess of $80 million.

Speedway Sonoma seeks to file this brief because the Department of Justice (DOJ) has imposed new regulatory requirements, to which Infineon Raceway is subject, in violation of the rulemaking mechanism established by the Administrative Procedure Act (APA). Compliance with the APA's public notice and comment requirements, which the DOJ bypassed altogether, is imperative to provide those subject to the DOJ's regulations with an opportunity to comment on proposed modifications that will affect their legal obligations, and thereby allow for a clear understanding of the law and ensure stability in regulatory enforcement.

Speedway Sonoma sought and obtained written consent to file an *amicus curiae* brief from petitioner. Petitioner's consent has been submitted herewith. On January 6, 2009, Sacramento counsel for Speedway Sonoma had a telephonic conversation with Russell Handy, an attorney affiliated with the Center for Disability Access ("Center") and counsel of record for

the respondent in the proceedings below, and obtained consent for Speedway Motorsports, Inc. ("SMI," the "parent" of Speedway Sonoma), and related entities, to file an *amicus curiae* brief in support of the petitioner. Counsel confirmed the telephonic conversation with correspondence that same day. The correspondence between Sacramento counsel and counsel for respondent has been submitted herewith.

Three days later, on January 9, 2009, Sacramento counsel sent a follow-up letter to Mr. Handy requesting the required written consent and reminding him of his prior verbal consent. No response was received.

On January 12, 2009, Sacramento counsel again wrote to Mr. Handy seeking the written confirmation of the earlier consent and clarifying that Speedway Sonoma, an affiliate of SMI, would be the lead *amicus*. Once again, no response was received.

On January 15, 2009, at 11:09 a.m., P.S.T., the afternoon before the *amicus* brief would be due, Mark Potter, another attorney affiliated with the Center, wrote to Sacramento counsel for Speedway Sonoma indicating that he could not "agree to give . . . permission to file" the *amicus* brief. Mr. Potter acknowledged that consent had previously been given, but mistakenly so, and then expressed his "deep[] regret any waste of resources that this misunderstanding may have caused you or your client." The brief, of course, had already been fully drafted in reliance on the earlier verbal consent and 10 days of silence in the face of repeated confirming correspondence, and was ready to be filed.

Speedway Sonoma's brief in support of the petitioner offers the Court valuable information pertaining to the scope of the impact of the Ninth Circuit's decision below and focuses primarily on broader concerns regarding the DOJ's failure to abide by the public notice and comment procedures of the APA.

Wherefore, Speedway Sonoma, LLC, respectfully requests that the Court grant this motion for leave to file an *amicus curiae* brief in support of the petitioner and accept the accompanying brief.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

Speedway Sonoma, LLC (Speedway Sonoma) is a Delaware limited liability company, which operates Infineon Raceway, a professional racetrack in Sonoma, California, the sixth-largest market for motorsports in the United States. The racetrack opened in 1968 and, since 1996 when Speedway Sonoma acquired it, has undergone substantial renovations[2] costing in excess of $80 million.[3] The racing facility is situated on 1,597 acres and includes a 2.52-mile, twelve-turn road course, a one-quarter mile modern drag strip, and an expansive industrial park; seating capacity exceeds 47,000 patrons per event. In 2007, Infineon Raceway hosted seven major racing events, or twenty racing days, including the NASCAR[4] Sprint Cup Series, National Hot Rod

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. Petitioner has consented to the filing of this brief; Respondent has not. The parties have been given at least 10 days notice of *amicus'* intention to file. Petitioner's consent has been submitted herewith.

2 Or "alterations," as defined in Title III regulations, 28 C.F.R § 36.403 and Section 3.5 of the Americans with Disabilities Act Accessibility Guidelines ("ADAAG").

3 The "alterations" provisions of the Title III regulations and ADAAG took effect on January 26, 1992.

4 The National Association for Stock Car Auto Racing (NASCAR) is the largest sanctioning body of stock car automobile races in the United States.

POWERade Drag Racing, the Indy Car Series, and the AMA Superbike Series. The raceway is host to one of only five NASCAR races each year that are run on road courses. In 2007, more than 328,000 fans attended motorsports events held at Infineon Raceway.

Speedway Sonoma submits this brief as *amicus curiae* in support of the position of petitioner, The California Speedway Corporation (California Speedway), because the Department of Justice (DOJ) has imposed new regulatory requirements, to which Infineon Raceway is subject, in violation of the rulemaking mechanism established by the Administrative Procedure Act (APA). Compliance with the APA's public notice and comment requirements, which the Department of Justice bypassed altogether, is imperative to provide those subject to the DOJ's regulations with an opportunity to comment on proposed modifications that will significantly affect their legal obligations, and thereby allow for a clear understanding of the law and ensure stability in regulatory enforcement.

SUMMARY OF ARGUMENT

The indisputable conflict that exists between the Ninth Circuit's decision below, *Miller v. California Speedway Corp.*, 536 F.3d 1020 (9th Cir. 2008), and the Third Circuit's decision in *Caruso v. Blockbuster-Sony Music Entertainment Center at the Waterfront*, 193 F.3d 730 (3d Cir. 1999), demonstrates precisely why the DOJ should not be permitted to adopt *sub silentio* new regulatory requirements ostensibly mandating how comparable lines of sight for disabled patrons should be implemented in sports facilities without complying

with the public notice and comment requirements of the APA. As the Third Circuit correctly observed, the DOJ abdicated its rule-making function with respect to Title III of the Americans with Disabilities Act (ADA) *entirely* to the Architectural and Transportation Barriers Compliance Board ("Access Board") in 1991 and adopted wholesale not only the Access Board's final rule, but also the *process* by which those rules were derived, including extensive changes made in response to public comments directed to, among other issues, the need for lines of sight for disabled patrons over standing spectators.

At the time of its adoption of the ADAAG in 1991, the Access Board unequivocally communicated that the ADAAG provision pertaining to comparable lines of sight – 28 C.F.R. pt. 36, App. A, § 4.33.3 – was not intended to address the question of whether lines of sight over standing spectators would be required and that such issue would be considered and addressed in regulations to be adopted in the future in connection with recreational facilities. Inasmuch as the DOJ adopted the ADAAG without qualification or clarification, racetrack owners and operators, along with virtually every other stadium, arena, theatre or major auditorium owner, were entitled to rely upon the Access Board's interpretation in constructing or renovating their sizeable facilities.

One of the principal purposes of the rulemaking mechanism set forth in the Administrative Procedures Act ("APA") is to ensure stability in regulatory enforcement and instill confidence in the public as to their legal obligations. Courts throughout the country have repeatedly acknowledged that the ADA, generally,

and section 4.33.3, specifically, are fraught with ambiguities that have led those same courts to reach at times conflicting interpretations. This, in turn, has resulted in needless litigation and the expenditure of hundreds of millions of dollars in facility construction and renovation based on supposition as to what the law requires. The DOJ's attempt to impose new construction and alteration requirements through any mechanism other than the APA's public notice and comment procedures only serves to exacerbate the instability in the law.

STATEMENT OF THE FACTS

Speedway Sonoma adopts the statement of the facts in petitioner's brief and provides the following additional factual information to assist the Court in its evaluation of the pending petition.

NASCAR has grown to become the second-most popular professional sport in the United States in terms of television ratings, ranking behind only the National Football League.[5] The largest NASCAR tracks can accommodate upwards of 250,000 people in the stands and infield, far larger than any non-motorsports venue in North America.[6] In fact, NASCAR holds 17 of the 20 highest attended sporting events in the country, and sanctions more than 1,200 events at 100 racetracks in

[5] *See* NASCAR, http://www.nascar.com/guides/about/nascar (last visited Jan. 14, 2009). Unless otherwise indicated, all web sites were last visited January 14, 2009.

[6] *See* NASCAR, http://www.nascar.com/races/tracks.

30 U.S. states, Canada and Mexico, many of which are broadcast to 150 countries in more than 30 languages.[7] NASCAR is but one of a number of racing organizations operating in the United States, including The United States Automobile Club,[8] the Automobile Racing Club of America[9] and the Indy Racing League,[10] just to name a few. Collectively, these organizations sponsor thousands of events at hundreds of facilities across the country, attended by tens of millions of spectators annually.

In addition to racing organizations, a host of other professional sports organizations sponsor events taking place in large stadiums or arenas, including Major League Baseball, the National Football League, the National Basketball Association, the National Hockey Association, the United States Tennis Association and United States Soccer. Major League Baseball, alone, operates for six months of the year in 30 stadiums with a combined annual attendance in 2008 of approximately 78,600,000 spectators.[11] National Football League games required another 27 stadiums and were attended by approximately 32,400,000 patrons.[12] Include the

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[7] *See* NASCAR, http://www.nascar.com/guides/about/nascar.

[8] *See* United States Auto Club, http://www.usacracing.com.

[9] *See* ARCA, http://www.arcaracing.com.

[10] *See* Indy Car Series, http://www.indycar.com.

[11] *See* ESPN, http://sports.espn.go.com/mlb/attendance.

[12] *See* ESPN, http://sports.espn.go.com/nfl/attendance.

remaining professional sporting events, plus all semi-professional and university level games, as well as concerts and other events held in these same facilities, and it becomes immediately evident that the ADA regulations at issue affect thousands of separate events, held at hundreds of facilities, attended by hundreds of millions of spectators each year.

Construction of these facilities is a complex endeavor that requires several years of advance planning and sophisticated engineering. The cost of constructing these facilities often easily exceeds $100 million, taking into account their size, enormous patronage and hundreds (if not thousands) of applicable local, state and federal regulatory requirements. Their financial feasibility and viability are often dependent on projected revenues. It is, therefore, imperative that, whatever federal regulatory requirements apply, they be clear and compliant with the APA. Modifying facilities to accommodate mandated post-construction changes is *ipso facto* more expensive than incorporating those requirements into original construction, and can have devastating impacts on loss of ticket revenue for facilities of this size.[13] The consequences of the DOJ's

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[13] Kevin McGuire, president of McGuire Associates Inc., an accessibility consultancy firm with considerable experience in rendering advice as to the renovation of stadiums and arenas to achieve ADA compliance, has indicated that such after-the-fact alteration of existing sports facilities inevitably involve significant financial burdens. Specifically, modifications to accommodate lines of site over standing spectators at four professional sports stadiums located in Philadelphia, Boston, Miami, Florida and Portland, Oregon cost between $250,000 (Cont'd)

conduct at issue here most certainly extend well beyond a solitary racetrack in California.

ARGUMENT

ALLOWING THE DOJ TO ADOPT NEW METHODS OF IMPLEMENTING ADA REGULATIONS WITHOUT COMPLYING WITH THE APA'S PUBLIC NOTICE AND COMMENT REQUIREMENTS DEFEATS THE SALUTARY PURPOSE OF THE APA WHILE DESTABILIZING THE LAW.

A. The Third Circuit's analysis in *Caruso* demonstrates that the DOJ entirely abdicated its rulemaking function to the Access Board when the latter adopted the ADAAG in 1991.

Although it had been directed by Congress to adopt implementing regulations for Title III of the ADA within one year of the statute's enactment, 42 U.S.C. § 12186(b) (2006), the DOJ elected to rely on the Access Board – which had been separately directed by Congress to enact minimum guidelines for Title III, 42 U.S.C. § 12204(a) (2006) – to devise the pertinent regulations. In its February 22, 1991 public notice, the DOJ indicated

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and more than $1 million in construction costs. In addition, the alterations have resulted and will continue to result in the loss of ticket revenue for 50 to 300 seats per event, per year. Under separate cover, Speedway Sonoma is filing a letter with the Clerk of the Court, pursuant to U.S. Sup. Ct. R. 32.3, requesting leave to file Mr. McGuire's affidavit attesting to this information.

that it intended to adopt the Access Board's proposed guidelines along "with any amendments made by the [Access Board] during the rulemaking process." 56 Fed. Reg. 7478-79 (1991). It further directed the public to submit "any comments" regarding the proposed guidelines directly to the Access Board. *Id.* at 7479.

Ultimately, the Access Board adopted the ADAAG, 56 Fed. Reg. 35,408 (1991), and provided an explicit commentary on the scope of the rules. As the Ninth Circuit correctly observed below, the Access Board addressed the problem of "lines of sight over standing spectators in sports arenas and other similar assembly areas" and noted that "many commenters also recommended that lines of sight should be provided over standing spectators." *Miller*, 536 F.3d at 1025 (citing 56 Fed. Reg. 35,440 (1991)). The Access Board, however, with respect to this issue, had also clearly stated: "[T]he issue of lines of sight over standing spectators will be addressed in guidelines for recreational facilities. . . ." 56 Fed. Reg. 35,440 (1991). Those guidelines eventually were adopted by the Access Board, after public notice and comment,[14] in July 2004, 69 Fed. Reg. 44,083 (2004), although to this day, they have *not* been adopted by the DOJ. *Miller*, 536 F.3d at 1027 n.1.

In concluding that the DOJ's 1994 supplement to the 1993 technical assistance manual (collectively, the "1994 TAM") – which purported to impose line of sight

[14] The Access Board first gave notice of its intent to adopt guidelines pertaining to the standing spectator issue in November 1999. 64 Fed. Reg. 62,248, 62,501-02 (1999). Almost five years later, the final guidelines were adopted by the Board.

requirements over standing spectators[15] – was not binding, the *Caruso* court noted five key factors that strongly supported its conclusion: (1) the DOJ referred all comments on the subject of standing spectators to the Access Board; (2) the DOJ relied upon the Access Board to make changes to the guidelines based on the public comments received; (3) the Access Board actually changed the language of section 4.33.3 in response to those comments and explained the change in the commentary; (4) the DOJ was a "member of the [Access] Board" and "participated actively . . . in the preparation of both the proposed and final versions of the [guidelines]"; and (5) the DOJ's own commentary noted that the final guidelines promulgated by the Access Board adequately addressed all comments. *Caruso*, 193 F.3d at 736. These factors go to the very heart of the APA's vital concern for a transparent rulemaking process. The DOJ, itself, noted these same facts in the statement it issued when it adopted the ADAAG as its own. 28 C.F.R. pt. 36, App. B, at 741-42. Nowhere did the DOJ affirmatively distance itself from or clarify the Access Board's commentary with respect to the limited scope of the ADAAG as to lines of sight.

At the heart of the five factors noted by the *Caruso* court arguably lies a concern for protecting the public notice and comment procedures of the APA. Hence, the Third Circuit observed that "[a]n agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to

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[15] The 1993 technical assistance manual was actually silent as to the issue of lines of sight over standing spectators. *Miller*, 536 F.3d at 1026.

mean something other than its original meaning." *Caruso*, 193 F.3d at 737 (quoting 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10 at 283 (1994)). The district court had similarly expressed the APA concern: "When the 'legislative history' of an administrative regulation evinces an intent not to cover a certain subject matter, the notice-and-comment requirements of the APA cannot be evaded merely by interpreting an existing regulation to cover subject matter consciously omitted from its scope." *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 968 F. Supp. 210, 216 (D.N.J. 1997).

Relying on this Court's holding in *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994), the Third Circuit refused to give any deference to the 1994 TAM finding that a contrary interpretation – namely, that the ADAAG did not encompass lines of sight over standing spectators – was "compelled by . . . indications of the [agency's] intent at the time of the regulation's promulgation." *Caruso*, 193 F.3d at 736-37 (quoting *Thomas Jefferson Univ.*, 512 U.S. at 512).

While the Third Circuit did not note this, the DOJ's 1994 TAM "implementation" of section 4.33.3 also *conflicted* with its earlier expressed intent to strive towards a unified set of regulations governing the ADA. In its preamble to adopting the ADAAG in 1991, the DOJ responded to commenters' concerns about harmonizing the various codes and sets of regulations that might affect ADA implementation. The DOJ stated:

> A single accessibility standard, or consistent accessibility standards, that can be used for

> ADA purposes and that can be incorporated or referenced by State and local governments, would help to ensure that the ADA requirements are routinely implemented at the design stage. The Department plans to work toward this goal. The Department, however, must comply with the requirements of the ADA . . . and the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

28 C.F.R. pt. 36, App. B, at 724. Allowing deference to the 1994 TAM implementation of section 4.33.3 would result in a standard that is at odds with the ADAAG, certainly insofar as the Access Board adopted them in 1991 (and as they remained until 2004). Such inconsistent standards would be contrary to the DOJ's explicitly stated "goal" of working toward "a single accessibility standard."

B. The APA's public notice and comment procedures serve the dual, salutary purposes of constraining agency power, thus preserving the separation of powers, and maximizing the efficacy of rulemaking by enlisting the assistance of those governed and sufficiently apprising them of their obligations.

The APA's public notice and comment requirements – set forth at 5 U.S.C. § 553 – "improve[] the quality of agency rulemaking by exposing regulations to diverse public comment, ensure[] fairness to affected parties, and provide[] a well-developed record that enhances the quality of judicial review." *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (citation and internal quotation

marks omitted). Congress intended in enacting these requirements that "the interested public should have an opportunity to participate, and the agency should be fully informed, before rules having such a substantial impact are promulgated." *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974). The importance of these requirements has led the courts to construe any exemptions from their scope very narrowly. *U.S. v. Picciotto*, 875 F.2d 345, 347 (D.C. Cir. 1989); *see also Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987) ("In light of the obvious importance of these policy goals of maximum participation and full information, we have consistently declined to allow the exceptions itemized in § 553 to swallow the APA's well-intentioned directive.") (citations omitted).

While courts have at times struggled with the distinction between a legislative rule, which must comply with the public notice and comment requirements of the APA, and an interpretive rule, which need not, a general consensus has developed that a legislative rule is one that "imposes any rights and obligations," *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987); "modifies existing rights, law, or policy," *W.C. v. Bowen*, 807 F.2d 1502, 1504 (9th Cir. 1987); "*effect*[s] a change in existing law or policy," *Mt. Diablo Hosp. Dist. v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988) (quoting *Linoz v. Heckler*, 800 F.2d 871, 877 (9th Cir. 1986) (original emphasis)); or "substantially alter[s] the rights or interests of regulated" parties, *Am. Hosp. Ass'n*, 834 F.2d at 1041. This Court, as well, has observed that a "substantive rule" or "legislative-type rule" is one "affecting individual rights and

obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (citation omitted).[16]

At least one commentator, however, has noted that what these courts have struggled with in differentiating between types of rules is founded largely on a fundamental concern about the nature of agency power

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[16] Perhaps more germane to the issues here, the D.C. Circuit has held:

> [I]f the rule is based on specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions, it is an interpretative rule. If, however, the rule is based on an agency's *power to exercise its judgment as to how best to implement a general statutory mandate*, the rule is likely a legislative one.

United Technologies Corp. v. U.S. EPA, 821 F.2d 714, 719-20 (D.C. Cir. 1987) (emphasis added). Given that the 1994 TAM amounts to the DOJ's exercise of its judgment as to how best to implement the ADA standards prohibiting discrimination and mandating accessibility – 42 U.S.C. §§ 12182(a), 12183(a)(1) – as well as the section 4.33.3 requirement that "lines of sight comparable to those for members of the general public" be provided, it is difficult to understand the Ninth Circuit's conclusion that the 1994 TAM was not legislative or substantive, especially when considered in the context of the earlier, explicit statement by the Access Board that the ADAAG did not encompass lines of sight over standing spectators. This conundrum grows exponentially when one considers that the Equal Employment Opportunity Commission's ADA technical assistance manual is *not* legally binding. *See, e.g., Garrison v. Baker Hughes Oilfield Ops., Inc.*, 287 F.3d 955, 960 n.3 (10th Cir. 2002); *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 n.2 (1st Cir. 1997).

and democratic values involving the separation of powers:

> These cases reflect a realization that the agency should not be able to fasten its will upon the affected public through any means it pleases. It may not tell people what they can and cannot do except through procedures that Congress by delegation has empowered them to use for making law. It may not enforce or apply a nonlegislative policy document in just the same way it may enforce or apply a legislative rule. Especially in view of the important values served by legislative rulemaking – enrichment of the agency's information and enhancement of the rule's acceptability, flowing from the public's opportunity to present facts and views – can it credibly be argued that unilaterally issued guidances or memoranda can possess the same force? Congress in the APA has provided that they cannot.

Robert A. Anthony, INTERPRETIVE RULES, POLICY STATEMENTS, GUIDANCES, MANUALS, AND THE LIKE – SHOULD FEDERAL AGENCIES USE THEM TO BIND THE PUBLIC?, 41 Duke L.J. 1311, 1356 (1992) (hereafter, "*Interpretive Rules*") (footnotes omitted). Professor Anthony goes on:

> Values served by the legislative rulemaking procedures are large ones. Fairness is furthered by giving notice to those who are to be bound, both when the proposed rule is

> about to be considered and when the final rule is definitively published. The accuracy and thoroughness of an agency's actions are enhanced by the requirement that it invite and consider the comments of all the world, including those of directly affected persons who are able, often uniquely, to supply pertinent information and analysis. The acceptability and therefore the effectiveness of a final rule are elevated by the openness of the procedures through which it has been deliberated and by the public's sense of useful participation in a process that affects them. Its legitimacy rests upon all of these considerations, as well as upon the foundational fact that the agency has observed the procedures laid down by Congress for establishing rules with the binding force of law. The agency's accountability for its rules is deepened by the court-made requirement of a reasoned explanation based upon a substantial rulemaking record.

Id. at 1373-74 (footnotes omitted). These sentiments have been echoed by other administrative law scholars:

> The rulemaking procedures of the APA have been widely acclaimed as a brilliant political innovation. The notice and comment procedure, together with hard-look judicial review, addresses our uneasiness with broad legislative delegations to administrative agencies and with the tenuous nature of the

other legislative and judicial checks on agency behavior.

The APA notice and comment procedure infuses the rulemaking process with significant elements of openness, accountability, and legitimacy. Public participation promotes fundamental democratic values by enhancing the responsiveness of agencies to the interest groups affected by regulation. It opens the process to groups and individuals with discordant points of view who might otherwise not have been heard during an agency's routine process of consultation with the public. In short, through advance notice and comment, every constituency has an opportunity to participate in a meaningful manner in making the laws that will affect it.

The requirement that agencies invite and give consideration to public comments broadens an agency's perspective, which otherwise might not extend beyond the views of the staff or the client groups with whom the staff regularly consults. . . . A rule is likely to be a better product if its drafters must consider seriously alternatives that they might have overlooked or take account of practical problems that otherwise would crop up only after a rule goes into effect. In addition, an agency may receive more cooperation and less obstruction from regulated interests that have had a hand in shaping the rules within

> which they must function. Finally, by generating a record of public comment and agency response, the notice and comment system facilitates pre-enforcement hard-look judicial review, an important check on factually unsupported or arbitrary regulation.

Michael Asimow, NONLEGISLATIVE RULEMAKING AND REGULATORY REFORM, 1985 Duke L.J. 381, 402-03 (1985) (footnotes omitted).

When the particular substantive rules in question have impacts on individuals and businesses expending hundreds of millions of dollars to construct or renovate dozens of facilities that will annually serve hundreds of millions of patrons and are expected to comply with inherently ambiguous statutory and regulatory standards governing accessibility,[17] it seems a justifiable

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[17] The Ninth Circuit below agreed in one critical respect not only with the D.C. Circuit's decision in *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998), but also with *Caruso* and just about every other court that has examined the issue: all these courts have concluded that the pertinent standards are ambiguous. *E.g.*, *U.S. v. Hoyts Cinemas Corp.*, 380 F.3d 558, 573 (1st Cir. 2004); *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 788-89 (5th Cir.), *cert. denied*, 531 U.S. 944 (2000); *Caruso*, 193 F.3d at 733; *Paralyzed Veterans of Am.*, 117 F.3d at 583; *Caruso*, 968 F. Supp. at 216. In fact, most recently, the Ninth Circuit described section 4.33.3 and its phrase "lines of sight comparable" as an "opaque regulation" lacking a "concrete meaning" and noted that the Access Board and DOJ had "failed to provide clear direction as to the precise meaning. . . ." *U.S. v. AMC Entm't, Inc.*, 549 F.3d 760, 764 (9th Cir. 2008). It posited, "Examining the conflicting (Cont'd)

minimum expectation of those individuals and businesses that the rules in question will be adopted in strict conformity with APA requirements and with maximum input from the public. As Professor Anthony observed:

> Ordinary citizens or even ordinary lawyers should not have to puzzle out the particulars of the agency's authority or its observance of procedural requirements. If the agency expects to apply its document in a binding way, it should be willing to declare that the rule is a legislative one, and to back up that claim with a showing of the specific authority and procedures it has observed. If these simple declarations were required, the public and the courts could know that documents issued without them were nonlegislative, and treat them accordingly.

Interpretive Rules, 41 Duke L.J. at 1378 (footnotes omitted). No less an astute observer of the law than Judge Bazelon cautioned against this surreptitious enactment of binding law without public notice or comment nearly 30 years ago:

> "[A]lthough [the announcement] serves as an interpretation of existing law, it also

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decisions reached by various courts, . . . it is clear that the text of § 4.33.3 did not even provide our colleagues, armed with exceptional legal training in parsing statutory language, a 'reasonable opportunity to know what is prohibited' – let alone those of 'ordinary intelligence.' " *Id.* at 768 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

> effectively enunciates a new requirement heretofore nonexistent for compliance with the law. . . . If left undisturbed by this court, this agency action would wield a significant change in the practices which private employers must follow and in the enforcement steps the agency must take. Under these circumstances, I believe that advance notice and opportunity for public participation are vital if a semblance of democracy is to survive in this regulatory era."

Chamber of Commerce of U.S. v. OSHA, 636 F.2d 464, 471-72 (D.C. Cir. 1980) (Bazelon, J., concurring); *see also Ala. Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999) ("Those regulated by an administrative agency are entitled to know the rules by which the game will be played.") (citation and internal quotation marks omitted).

The 1994 TAM serves as the quintessential example of surreptitious rule making. Three years after deferring its rulemaking function to the Access Board (while still "actively participating" as a member of the Board) and allowing the Access Board to field and respond to all comments regarding lines of sight, and 10 years before the Access Board would finally get around to fully considering the standing spectator problem and enacting a pertinent, APA-compliant regulation, the DOJ subtly imposed a new construction/renovation standard for dozens of multi-million dollar sports and recreational facilities nationwide without the slightest input from the various affected commercial industries or the hundreds of millions of patrons they serve.

CONCLUSION

While historically unregulated interests might be tempted to suggest that the Access Board's 2004 adoption of a guideline specifically addressing the issue of standing spectators and the DOJ's imminent enactment of that same regulation prospectively render the Ninth Circuit's error "no harm, no foul," the problem inherent in the DOJ's issuance of the 1994 TAM is considerably broader in scope. Courts continuously struggle with the APA-created dichotomy between legislative rules and interpretive manuals or guides, and their opinions point despairingly and oftentimes simultaneously in multiple directions when offering judicial guidance. Certainly, the DOJ had not gotten whatever "message" there was to be had when it unilaterally issued the 1994 TAM and declared a new way to implement the ADA's statutory mandates.

The Court has the opportunity to resolve an unquestionable split among the circuit courts of appeal with respect to the effect of the 1994 TAM, and in so doing, provide clearer guidance to the agencies and the constituents they govern through their rulemaking. Speedway Sonoma respectfully urges the Court to avail itself of this opportunity and accept jurisdiction.

Respectfully submitted,

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